25

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 267.

THE ORDER OF ST. BENEDICT OF NEW JERSEY,
PETITIONER,

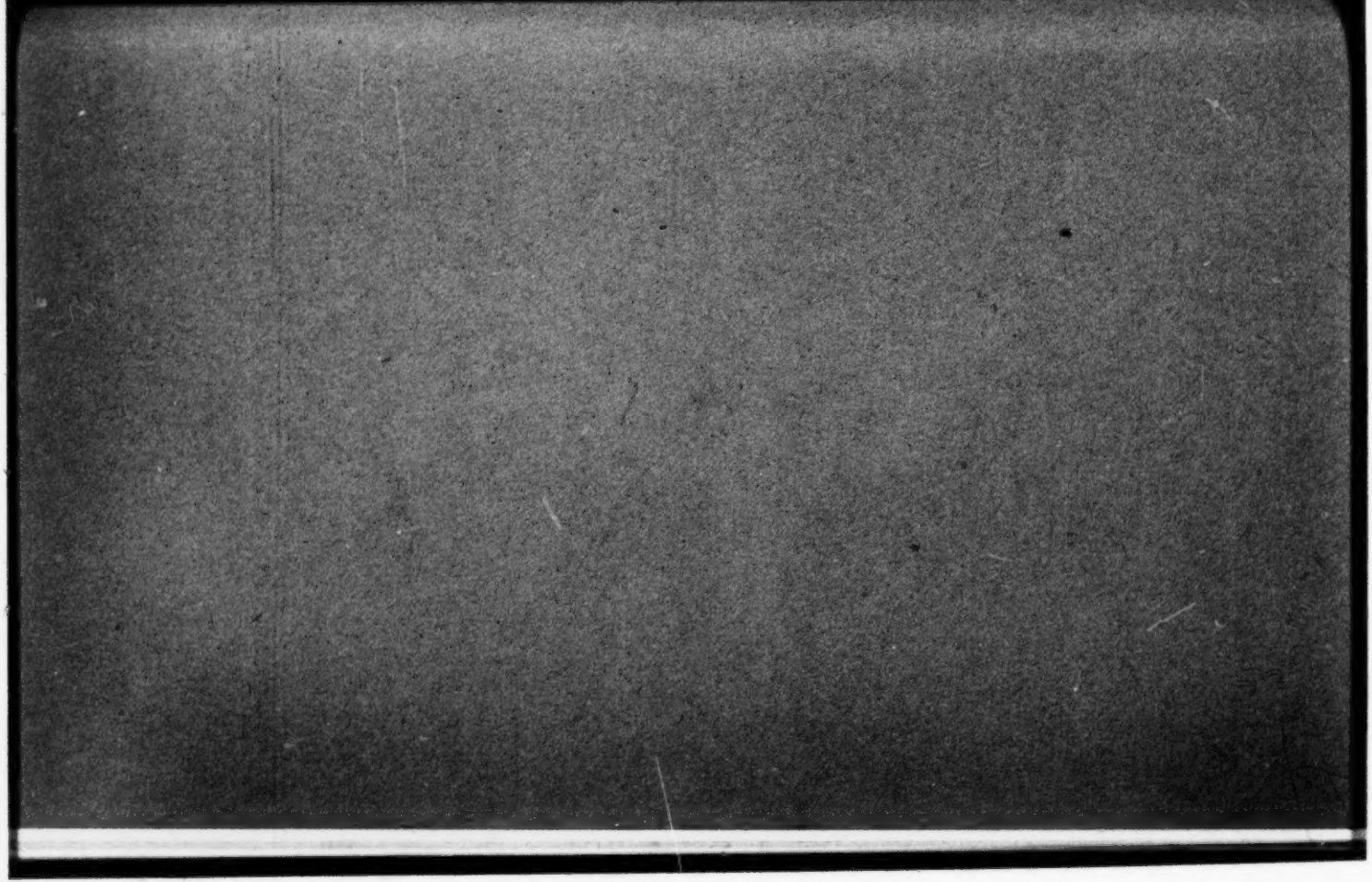
vs.

ALBERT STEINHAUSER, INDIVIDUALLY AND AS ADMINISTRATOR, ETC., OF AUGUSTIN VIRTH, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 31, 1913.
CERTIORARI AND RETURN FILED JULY 8, 1913.

(23,233)



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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1911, of said Court, Before the Honorable Elmer B. Adams and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Henry T. Reed, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore to-wit: on the twenty-first day of December, A. D. 1910, a transcript of record, pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, is Appellant, and The Order of St. Benedict of New Jersey is Appellee, which said transcript of record is in the words and figures following, to-wit:

1 Circuit Court of the United States in and for the 2nd Division, District of Minnesota.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Defendant.

Bill.

To the Honorable the Judges of the Circuit Court of the United States in and for the District of Minnesota:

The Order of St. Benedict of New Jersey, a citizen of the State of New Jersey, being a corporation duly organized and existing under the laws of the State of New Jersey and having its principal place of business in the City of Newark, County of Essex and State of New Jersey, brings its Bill of Complaint against Albert Steinhauser, individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, of the Village of New Ulm, in the County of Brown, and States of Minnesota, and a citizen of the State of Minnesota.

First. And thereupon your orator complains and says that the matter and amount in controversy herein exceeds the sum and value of Two Thousand Dollars, exclusive of interest and costs.

Second. And your orator further shows to your Honors on information and belief, that on or about the 19th day of December,

1901, Augustin Wirth, for many years prior thereto a resident of the County of Essex, State of New Jersey, died intestate, in the County of Brown, State of Minnesota.

Third. And your orator further shows on information and belief that on the 16th day of March, 1904, letters of administration of the goods, chattels and credits of said Augustin Wirth were granted and issued to Albert Steinhausers, pursuant to a decree made and entered by the Judge of the Probate Court of said County of Brown within the State of Minnesota where said Augustin Wirth died as before stated; said decree being made upon certain papers in which, among other things, it was alleged that said Augustin Wirth was a resident at the time of his death of said County of Brown and left personal property in said County and in said State of Minnesota.

2 Fourth. Your orator further shows on information and belief, that said Augustin Wirth was the author of the following books: "Hunolt Sermons;" "New May Devotions;" "The Confessional;" "Eight Short Practical Sermons on Mixed Marriages;" "New and Old Sermons;" "The Seven Last Words on the Cross;" "Two Retreats for Sisters;" "Thoughts and Counsels for the Consideration of Young Men;" "Lenten Sermons;" "Funeral Sermons;" "The Two-Edged Sword;" "The Sacrament of Penance;" and for the purpose of obtaining a copyright thereof said Augustin Wirth had, prior to the 23rd day of July 1897, filed with and deposited in the office of the Librarian of Congress of the United States the statement, affidavit and application required by law, together with a printed copy of the title page of each of said books and, within ten days of the publication of each of said books, two printed copies thereof, and that each of said books had printed on the title page, or the page following thereof, the notice required by law that the same had been entered, giving the year, in the office of the Librarian of Congress at Washington D. C., and your orator further shows, upon information and belief, that said Augustin Wirth duly copyrighted each of said books under and in accordance with the then existing copyright laws of the United States by complying in all respects with the conditions and requirements of said laws, whereby there was secured to said Augustin Wirth and his assigns, during his life time, and to his executors, administrators or assigns upon his death, for the term of twenty-eight years from the date of the copyright of each of said books respectively, the full and exclusive right of printing, publishing and vending said books aforesaid throughout the United States, and that during the said period aforesaid, and from time to time, Louis G. Benziger and Nicholas C. Benziger, publishers, doing business in the City of New York, State of New York, under the firm name of Benziger Brothers in the usual course of their business in buying and selling books, bought of said Augustin Wirth for resale and sold many of his said copyrighted books.

Fifth. And your orator further shows that on or about July 23rd, 1897, said Benziger Brothers entered into a written contract and agreement with said Augustin Wirth, copy whereof is hereto annexed, and made a part of their bill of complaint, and marked Ex-

hibit "A," wherein and whereby the said parties agreed, among other things, as follows:

Said Augustin Wirth agreed to give to them the exclusive sale of "Hunolt Sermons" in five volumes, for the term of ten years, and to deliver to them the complete stock of said books that he
3 then had on hand. They agreed to print and bind said books when they had to be reprinted, the charge for paper, printing and binding to be paid by Augustin Wirth at the cost price. Said Augustin Wirth agreed to furnish said "Hunolt Sermons" to them at fifty per cent discount from the advertised price. At the expiration of ten years from the date of the agreement, the date of the agreement being the twenty-third day of July, 1897, the plates of the five volumes of said "Hunolt Sermons" were to become the property of Benziger Bros. with the right to publish the work without paying any royalty thereon, together with the stock then on hand. Benziger Brothers were to have the right to buy at the cost price all paper, printing and binding of the same.

Said Augustin Wirth further agreed to give to Benziger Brothers for the term of three years, and thereafter until six months' notice was given by either of the parties of the termination of the contract, exclusive sale of his other books named above, namely: "New May Day Devotions," "The Confessional," "Eight Short Practical Sermons on Mixed Marriages," "The Seven Last Words on the Cross," "New and Old Sermons," "Two Retreats for Sisters," "Thoughts and Counsels for the Consideration of Young Men," "Lenten Sermons," "Funeral Sermons," "The Two-Edged Sword," "The Sacrament of Penance;" said Wirth agreeing to deliver to Benziger Brothers not later than three months from the date of said agreement, the complete stock he then had on hand of the above mentioned books. When any of said books had to be reprinted, Benziger Brothers agreed to order the paper and have the printing and binding done, charging the printing and binding at the cost price to said Augustin Wirth.

Said Augustin Wirth further agreed to furnish the above mentioned eleven books to Benziger Brothers with a discount of forty per cent from the advertised sale. Benziger Brothers agreed to make payment to said Augustin Wirth of the money due him from the sale of his books during the months of October, January, April and July of each year. They agreed further to treat said books as their own publications, and put them in their catalogue of publications.

Sixth. Your orator further shows that said Augustin Wirth delivered to Benziger Brothers his stock of said copyrighted books prior to July twenty-third, 1897, and that immediately thereafter they entered upon the performance of said contract as above set forth, and between said 23rd day of July, 1897, and the 19th day of December, 1901, the date of the death of Augustin Wirth, sold said copy-
4 righted books and publications and during the months of October, 1897, January, April, July and October of the years 1898, 1899 and 1900, and during the months of January, April and July of the year 1901, duly accounted in accordance with the terms of said contract for all the sales of said copyrighted books and pub-

lications made by them during the preceding three months, and for the cost of paper, printing and binding disbursed by them under said contract and agreement, and during each of said months aforesaid paid to said Augustin Wirth the several amounts they found to be due on account of the sales made by virtue and under the conditions of said contract, and that on the 19th day of December, 1901, there was due on account of said sales made under said contract during the months of October, November and December of said year, the sum of $175.40, which sum Benziger Brothers on the 25th day of January, 1902, paid to your orator, the Order of St. Benedict of the State of New Jersey, a religious corporation created by and existing under the laws of that State upon its written demand, as hereinafter more particularly set forth.

Seventh. And your orator further shows that after the death of said Augustin Wirth, Benziger Brothers continued to sell and are still selling under and by virtue of said contract said copyrighted books and publications of said Augustin Wirth. That from the proceeds of said sales and on the 2nd day of June, 1902, they paid to your orator, said Order of St. Benedict, upon its demand $349.00

On the 13th day of July, 1902	53.20
On the 9th day of October, 1902	186.50
On the 20th day of January, 1903	102.22
On the 29th day of April, 1903	246.45
On the 31st day of July, 1903	39.50
On the 21st day of October, 1903	125.90
On the 20th day of January, 1904	157.80
On the 13th day of April, 1904	200.95
On the 14th day of July, 1904	107.80
On the 13th day of October, 1904	148.77
On the 26th day of January, 1905	168.10
On the 19th day of April, 1905	224.85
On the 26th day of July, 1905	112.45
On the 28th day of October, 1905	200.00
On the 22nd day of January, 1906	156.45
On the 13th day of April, 1906	175.95
On the 16th day of July, 1906	158.10
On the 17th day of October, 1906	153.45
On the 24th day of January, 1907	200.00

being the amounts due upon said contract.

5 Eighth. And your orator further shows that said Augustin Wirth was a Catholic priest, and a member of the corporation known as the Order of St. Benedict of the State of New Jersey, being your orator. At the time of his death he was about 76 years of age.

That the Order of St. Benedict was established by St. Benedict in the end of the fifth and beginning of the sixth century at Sublaco and Monte Cassino, Italy. The purpose of the members was to live in community, apart from the world, in monastic life; but, nevertheless, to devote themselves to charitable and educational purposes. The organization of the Order was sanctioned and approved by the highest authority of the Catholic Church in Rome, namely, the

Pope. The result of the work of the Order was the civilization of Europe. To become a member, it was necessary at the time of making profession to take what were described as the vows of chastity, poverty and obedience. The significance of the vow of poverty was the giving up of all right of possessing temporal goods, and the transfer of all property to the "Community" of members, and the taking of the vow was always accompanied by an actual transfer by the member to the Society of all temporal goods which he then possessed, and by an agreement that he should henceforth assign to it whatever he might acquire.

At the organization of the Order, St. Benedict, the founder thereof, formulated in Latin a rule known as "The Rule of St. Benedict," which in terms regulated the government of the Order and attached hereto and marked "Exhibit B" is a copy in the English language of one Chapter of said "Rule." Under the original rule formulated by St. Benedict the community, composed of the members of the Order, could hold and acquire real estate and later could acquire personal property, such ownership and possession being an ownership and possession in common for the uses and objects of the Order.

The significance of the vow of obedience was to deprive the member of his individual liberty as regards temporal things, and to subject him to the absolute control as to his movements of the monastic authority of the Order. His immediate superior was the abbot of the Abbey. Often a member was sent into a new field of work in which case he transferred his vows to the Abbey to which he went. Wherever his work might be, he was required to account for all moneys received by him, and pay the same to his abbot. In special cases with his Abbot's consent, he might himself dispense the money for the benefit of the "Community" and for the objects of his Order. Such consent was always revocable.

6 Upon a person becoming a member of the Order of St. Benedict, and taking the vows mentioned, the Order agreed on its part to maintain and support the member for life, in sickness and in health; and in case of a transfer, the New Abbey assumed the agreement of maintenance.

The Order of St. Benedict, as above described, spread all over Europe, and in later times to the United States and South America.

The first Order in the United States was established in or about 1846, and was known as the Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania.

Augustin Wirth came to the United States prior to 1852, and made the above described vows at St. Vincent's of Westmoreland County, Pennsylvania. A translation of the original vow which he made at St. Vincent's, and which is in the Latin language, is annexed hereto and marked "Exhibit C."

A copy of the Act of Incorporation of the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, and of its By-Laws, is attached hereto and made a part hereof, and marked "Exhibit D-1 and D-2, respectively.

And your Orator further shows that subsequently in 1865, Augustin Wirth was sent as a Prior by the Order of St. Benedict of Westmoreland County, Pennsylvania, to Atchison, Kansas, to take

charge of and conduct there St. Benedict's Monastery, St. Benedict's College and St. Benedict's Church, and his work was continued in Atchison until the month of May, 1887. In May 1887, at which time the Order of St. Benedict of Kansas had become incorporated, he transferred his vows to St. Mary's Abbey of Newark, New Jersey, which Abbey is hereinafter referred to more particular, attached hereto and made a part hereof and marked Exhibit "E" is a copy of said transfer. The effect of said transfer, according to the Canon Law of the Society, and according to the community agreement of the members, and as understood and intended by the parties, was to vest in the Abbey of St. Mary's of Newark, New Jersey, all rights that the original Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania, had in the property of said Augustin Wirth and in all property he might thereafter acquire.

St. Mary's Abbey, above mentioned, is incorporated in the State of New Jersey, under the corporate name and style of "The Order of St. Benedict of New Jersey," and the following is a portion of Section Twelve of the constitution of said Order namely:

7 "Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members are and must be considered as common property of the Order of St. Benedict of New Jersey, from which the members of said Order derive their support, and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

Moreover, that each member individually pledges himself to have all the property which he now holds or hereafter may hold in his own name, conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

A copy of the Act of Incorporation of said Order and of its Constitution and By-Laws is hereto attached and made a part hereof and marked "Exhibits "F1" and "F2" respectively.

And your orator further shows that from May 1887, down to the time of his death, December 19th, 1901, Augustin Wirth remained a member of St. Mary's Abbey and The Order of St. Benedict of New Jersey, and during all of said time received his maintenance and support from said Society and Order. At times and in some cases covering long periods he was sick when he was nursed and cared for by the members of the Order. Before the publication and sale of his books by Benziger Brothers he was also assisted by the members of the Order in the publication, sale and delivery of said books. By special permit of his Abbot, he was at times relieved of his educational, charitable and religious work that the publication and sale of his books might be conducted with greater profit to the Order.

That the reasonable and actual value of the said maintenance,

nursing and care of said Augustin Wirth, and said assistance given to him in connection with the publication and sale of his books far exceeded the value of the copyrights of said books and all profits from the sale of the same prior to the commencement of this action and all profits that will hereafter accrue.

During a part of the period mentioned, he was, by permission from his Abbot in Newark, New Jersey, permitted to build
8 a church and take care of a congregation in Springfield, Minnesota, beginning this work in August, 1898.

From May 1887, to August 1898, his religious and charitable work had been done in New Jersey. He was continuing his work in Springfield, Minnesota, when he died.

And your orator further shows that said Augustin Wirth during his lifetime, as is required by the rules and regulations of the Order of St. Benedict, accounted for moneys received by him in his work, including the moneys paid to him by Benziger Brothers mentioned at folio- 16 and 17 hereof, except at such times when for reason an accounting was waived by your orators.

As heretofore alleged, said Augustin Wirth was in receipt of considerable money from various sources connected with his educational charitable and religious work and from the sales of his books which at times with the special permission of his superiors he held and dispensed for the benefit of the community and for educational and religious purposes; this permission was revocable at any time. This permission was in force at the time of part of the time of the payments of money to him set up in Folios 16 and 17 hereof.

On or about the 20th day of June, 1899, the above permission was revoked by the Abbot of New Jersey, and the Abbot Primate of Rome, and from that time said Augustin Wirth was required to account to the Abbot of New Jersey for all moneys received by him.

Ninth. And your orator further shows that there is now in the hands of Albert Steinhauser, individually or as administrator of the estate of Augustin Wirth, deceased, $1,524.65 in money and the proceeds of certain notes and mortgages which were foreclosed by said Albert Steinhauser as such administrator and the record title to which now are in Albert Steinhauser as administrator of the estate of said Augustin Wirth, deceased, and other property, of the value of at least $896.85, a list of which is hereto attached and made a part hereof and marked "Exhibit F3", which was not turned over to complainant by decedent in his life time.

That the said property and all of the same is the result of labor performed by said Augustin Wirth, while he was a member of said order and while the alleged contract between him and complainant was in full force and effect, and is money and property so earned by said Augustin Wirth during said time, and in equity and good conscience belongs to your orator.

Tenth. And your orator further shows, on information and belief, that the Order of St. Benedict and its members performed
9 their contract at all times to maintain said Augustin Wirth and that said Augustin Wirth did not in his life time transfer or assign to the order of St. Benedict said property and was pre-

vented by his death from so assigning, transferring and conveying the said property above mentioned and to assign the copyrights obtained by him as aforesaid, and that in equity and law the Order of St. Benedict is entitled to said moneys, notes and mortgages and property and also all copyrights and to all benefits and moneys arising from said copyrights.

Eleventh. And your orator further shows, on information and belief, that said Augustin Wirth left no debts or unsatisfied demands against his estate at the time of his death. He left him surviving a brother and certain nephews and nieces residing in the State of Minnesota as his only next of kin, the particular names and places of residence are to your complainant unknown.

Twelfth. Your orator further alleges (though it claims the same as immaterial) that as a corporation it has not received a greater amount of income or principal of personal or real estate than is permitted it by the laws of the State of New Jersey, and that this will be so even though the Court award judgment hereinafter prayed for.

Thirteenth. By reason of the facts above alleged, your orator alleges and claims that the equitable title to the moneys, notes and mortgages and other property set forth in Exhibit F3, and the copyrights mentioned in this Bill of Complaint is in your orator, the Order of St. Benedict of New Jersey, and that the payments above alleged to have been made by Benziger Brothers to the Order of St. Benedict of New Jersey arising out of the sale of said copyrighted books, were valid payments and that said Order was entitled to the moneys so paid and not the defendant as administrator of Augustin Wirth, deceased.

Fourteenth. And your orator further shows that on the 17th day of October, 1906, an action at law was commenced in the United States Circuit Court for the Southern District of New York by the defendant Albert Steinhauser, as administrator of the goods, chattels and credits of Augustin Wirth, deceased, against said Benziger Brothers, the object of said suit being to recover from them the amount above alleged to be paid to your orator.

That as the facts stated in the bill of complaint in said action could not be set up as a defense in the action brought by the
10 defendant above mentioned for the reason that the same constituted an equitable defense which could not be pleaded in an action at law, said Benziger Brothers on the 15th day of December, 1906, brought an action in the same Court and same district on the equity side of the Court against said Administrator, to enjoin the action just mentioned and to adjudge that the equitable title to the copyrights mentioned were in your orator and that the payments made by them to your orator were valid payments, and that your orator was entitled to the moneys so paid; that said action is now pending.

And your orator further alleges that it is remediless in the premises at and by the strict rule of the common law and is only relievable in a Court of Equity where matters of this kind are properly cognizable and reviewable; and the acts and doings of the defendant

herein complained of are contrary to equity and good conscience and tend to manifest injury of your orator in the premises.

To the end therefore that your orator may have that relief which it can only obtain in a court of equity and that the said defendant may answer the premises, your orator now prays the Court that it may be adjudged that the equitable title to the moneys, notes and mortgages and other property and copyrights mentioned in this bill of Complaint is in the Order of St. Benedict of New Jersey, and adjudging further that the payments made by Benziger Brothers to the Order of St. Benedict of New Jersey were valid payments and that your orator was entitled to the moneys so paid, and not the defendant as administrator of Augustin Wirth, deceased; and that this Honorable Court will grant an order directing the defendant to pay over and transfer the moneys, notes and mortgages and other property herein mentioned to them, and also to assign said copy rights; and that your orator may have such further or other relief herein as to the Court may seem proper.

And may it please your Honors to grant unto your orator a writ of subpœna to be directed to the defendant Albert Steinhauser, individually and as administrator of the goods, chattels and credits of Augustin Wirth, deceased, commanding him on a certain day to appear and answer this bill of complaint and to abide by and
11 perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

ALBERT SCHALLER,
Sol'r for Complainant and of Counsel.

314-315 New York Life Bldg. St. Paul, Minn. Res.: Hastings, Minnesota.

ARNOLD AND GREENE,
Of Counsel.

EXHIBIT "A".

Agreement made between Rev. Augustin Wirth, O. S. B., of Elizabeth, N. J., and Benziger Brothers, of New York.

1. Rev. Augustine Wirth, O. S. B., gives the exclusive sale of all his books to Benziger Brothers, under the following conditions:

2. Rev. Augustine Wirth, O. S. B., gives to Benziger Brothers the exclusive sale of "Hunolt Sermons" in five volumes, for the term of ten years.

3. Rev. Augustine Wirth, O. S. B., will deliver to Benziger Brothers, not later than three months from the date of this agreement, the complete stock he has on hand of said "Hunolt Sermons." When the volumes have to be reprinted, Benziger Brothers print and bind them, and charge the paper, print and binding to Rev. Augustine Wirth, O. S. B., at the cost price.

4. Rev. Augustine Wirth, O. S. B., will furnish said "Hunolt Sermons" to Benziger Brothers with 50% discount from the advertised price.

5. After the expiration of ten years from the date of this agreement, in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and without any further payment, the plates of the five volumes of the said "Hunolt Sermons" become the property of Benziger Brothers, and they have the right to publish the work, without paying any royalty on it. All the stock then on hand of "Hunolt Sermons" Benziger Brothers have the right to buy at cost price of paper, print and binding.

6. Rev. Augustine Wirth, O. S. B., gives to Benziger Brothers for the term of three years, and also thereafter till six months' notice is given by either of the parties, the exclusive sale of his other books, viz:

"New May Devotions",
"The Confessional",
"Eight Short Practical Sermons on Mixed Marriages",
"The Seven Last Words on the Cross",
"New and Old Sermons", 8 Vols.
"Two Retreats for Sisters",
"Thoughts and Counsels for the Consideration of Young Men",
"Lenten Sermons",
"Funeral Sermons",
"The Two-Edged Sword",
"The Sacrament of Penance".

7. Rev. Augustin Wirth, O. S. B., will deliver to Benziger Brothers, not later than three months from the date of this agreement, the complete stock he has on hand of the above mentioned books. When any of the books has to be reprinted, Benziger Brothers will order the paper and have the printing and binding done, and will charge the paper, print, and binding at cost price to Rev. Augustine Wirth, O. S. B.

8. Rev. Augustine Wirth, O. S. B., will furnish the eleven above-mentioned books to Benziger Brothers with a discount of 40% from the advertised price.

9. Benziger Brothers will make payment to Rev. Augustine Wirth, O. S. B., of money due him from the sale of his books during the months of October, January, April and July of each year. Whenever Benziger Brothers charge Rev. Augustine Wirth, O. S. B., for paper and print they will send at the same time as vouchers the bill of the paper manufacturer and of the printer. In regard to the binding Benziger Brothers will submit each time when a book is to be bound an estimate to Rev. Augustine Wirth, O. S. B., for approval. Should Benziger Brothers not hear from father Wirth within two weeks after having informed him of the price at which they would bind the book, they have the right to bind the books at the price submitted, provided [they] price is not higher than that which was charged before.

10. Rev. Augustine Wirth, O. S. B., has the right during three months from the date of this agreement to furnish his books direct to priests who may order from him within this time.

11. Rev. Augustine Wirth, O. S. B., will deliver to Benziger Brothers the plates of all of the above-mentioned books, and Ben-

ziger Brothers will keep them in their printers' vaults, uninsured, and at Rev. Augustine Wirth's risk.

12. Benziger Brothers will do all they can to push Rev. Augustine Wirth's books, and will treat them as if they were their own
13 publications, will put them in the catalogue of their publications, and make a special circular of them.

Elizabeth, N. J., July 23, 1897.

(Signed) AUGUSTIN WIRTH, *O. S. B.*
BENZIGER BROTHERS.

EXHIBIT "B".

The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the Abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for anyone to have anything which the Abbot did not give or permit him to have. Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if anyone should be found to indulge this most baneful vice, and having been admonished once and again, doth not amend, let him be subject to punishment.

EXHIBIT "C."

In the Name of Our Lord Jesus Christ, Amen!

I, Brother Augustine Wirth, a Bavarian of the diocese of Wuerzburg, to the honor of Almighty God, of the ever Blessed Virgin Mary, and our holy Father St. Benedict, and of all the Saints, by these present vows promise stability and the conversion of my morals, and obedience according to the Rule of the same holy Father St. Benedict, in the presence of God and His Saints, whose relics are here present in the church, and also in the presence of the Right Reverend Father in Christ and Lord Boniface, the Superior of this Monastery of St. Vincent's and of you Rev. Fathers and Brothers here present; in the name of the Father, and of the Son and of the Holy Ghost, Amen.

In Witness Whereof I have written with my own hand this present paper in this venerable place of St. Vincent, in the year one thousand eight hundred and fifty two from the Incarnation of our Lord, on the feast of the Assumption of the Bl. Virgin Mary, the fifteenth day of August.

(Sign of the Cross.)

14 EXHIBIT "D1."

An Act to Incorporate the Benedictine Society in Westmoreland County.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by authority of the same, that Boniface Wimmer, Celestine Englbracht, Peter Henry Lemki, Otho Huber, citizens of the State of Pennsylvania, and their associates, members of the society called the Benedictine Order, being a society of religious men living in communite and devoted to charitable works and the education of youth, be and they hereby are constituted a body politic and corporate, by the name, style and title of "The Benedictine Society", to have perpetual succession, to use a common seal and alter and renew the same at pleasure, to take hold and enjoy lands, tenements and hereditaments, and to make such by-laws, for their government and for the admission of members into the corporation as they shall deem necessary and proper; Provided that such by-laws shall not be repugnant to nor inconsistent with the constitution and laws of the United States or of this State; And provided also, that the clear yearly income of the real estate to be held by said corporation, exclusive of the houses occupied by the society and grounds thereto attached, shall not exceed the sum of three thousand dollars; and provided, that no person shall be or remain a corporator, except regular members of said religious society living in community and governed by the by-laws thereof.

SECTION 2. That the essential objects of said corporation shall be the relief and support of sick, destitute and dependent persons, the maintenance of orphans, the care and education of youth and the establishment of churches and conducting of services therein.

SECTION 3. That no misnomer of the said corporation and their successors, shall defeat or annul any gift, grant devise or bequest to or for the said corporation; provided that the intent of the party or parties shall sufficiently appear on the face of the gift, will, grant, or other writing, whereby any estate or interest was intended to pass to or for the said corporation.

SECTION 4. That any person or persons now holding or hereafter to hold any goods, chattels or property, real or personal estate, or interest whatever, in trust or for the use of the said society or any of the members, are hereby authorized to convey, transfer, grant and make over the same to the corporation, hereby created,
15 freed and discharged from all such trusts; provided, that the said corporation shall appropriate the same to the same uses as the donors or grantors, by whom the said property, real or personal, was originally given or granted, shall have given or granted the same; provided further, that no private rights or vested inter-

ests shall be affected or in any way prejudiced by such conveyance to the corporation.

S. P. SCHELL,
Speaker of the House of Representatives.
THO. CARSON,
Speaker of the Senate.

Approved: The nineteenth day of April, one thousand eight hundred and fifty-three.

WM. BIGLER.

Office of the Secretary of the Commonwealth.

HARRISBURG, *August 26th, A. D.* 1890.

PENNSYLVANIA, *ss:*

I do hereby certify, that the foregoing and annexed is a full, true and correct copy of the original Act of the General Assembly, entitled an Act "to incorporate the Benedictine Society in Westmoreland County," approved the 19th day of April, A. D., 1853, as the same remains on file in this office.

In Testimony Whereof, I have hereunto set my hand and caused the Seal of the Secretary's Office to be affixed the day and year above written.

[Seal of Secretary's Office, Pennsylvania.]

J. H. LONGENECKER,
Deputy Secretary of the Commonwealth.

EXHIBIT "D2."

By-Laws of the Benedictine Society at St. Vincent's, Westmoreland Co., Pennsylvania.

Section 1st.

The common seal of this Society shall be a heraldic square, divided into four fields and a middle shield headed by a mitre to the left of which shall be the crozier, to the right the cross. The left upper field to contain the loaves of Bavaria, the right upper field the lilies, the left lower field the eagle, the right lower field the
16 stars. Around the whole shall be the inscription: "Benedictine Society of Westmoreland Co., Penna."

A small seal without the mitre crozier and cross shall be used for more common transactions or purposes.

Section 2nd.

The education of youth shall be the chief object of this society and strenuous efforts shall be made to get up a large establishment at St. Vincent's County and State aforenamed, first, to educate young men for the society so that they may be able to instruct youth in all

classical and scientific branches, second, to open it to the public at large in particular to the middle and poorer classes. Besides this essential object the society will not forget to attend to the other objects mentioned in Section 2 of the Charter.

Section 3rd.

As members of this corporation are ipso facto admitted all those members of the Benedictine Order in the United States:

1st. Who belong to the Abbey of St. Vincents', Westmoreland Co., Penna.;

2nd. Who made their solemn profession to the Order.

3rd. Who have been ordained priests.

Section 4th.

The membership in this Society is lost ipso facto by any member:

1st. Who leaves the Benedictine Order to join any other religious community.

2nd. Who gets dispensed from his vows to become a secular priest.

3rd. Who without dispensation lives out of communion with the Order with or without the will of the Abbott.

4th. Who shall be dismissed from the Order for crimes committed by him or for continued disobedience to the rules of the Order.

5th. Who shall cease to be a member of the Roman Catholic Church or give up his sacerdotal character, e. g., by getting married, etc.

Section 5th.

The legally elected Abbott of St. Vincents, County and State aforesaid, approved of by the Apostolic See, is at once and for all times as long as he is Abbot President of this Society. The Prior of St. Vincents is Vice-President, the Sub-Prior Secretary, and the Procurator the Treasurer of this Society.

17

The President, Vice-President Secretary and Treasurer constitute the inner council of the Society. All the other members of the Society residing at St. Vincents constitute the outer council of the Society.

All the common business of the society is done by the President immediately or mediately by the Treasurer, according to the rules of the order of St. Benedict. In particular cases the President has to hear the advice of the inner council and in very important matters the outer council also; in this case a majority is required to empower the president to act.

Section 6th.

Every three years a general meeting is to be held, where the President and treasurer shall give an account of the state of the

financial affairs of the Society and where redress shall be made, if neglect or bad management should be proved.

At this meeting the Vice-President and other officials should be nominated and appointed to serve for three years.

Section 7.

As this Society is a charitable Society, it is understood and agreed to by all members of it, and it is a condition on which every member is received, that each and every member of this Society shall give his services gratuitously, neither receiving nor expecting any salary, compensation or remuneration, except as much as needs for his support according to the rules of the Benedictine Order.

Whenever, therefore, any member of this society shall voluntarily give up his membership or shall be dismissed from the Society, or shall cease to be a member thereof from any reason mentioned in Section 4, of these By-Laws, he shall have no right whatsoever to claim any part of the property of this Society, as all the property is expressly destined for the whole society as a means to carry out and perpetuate the charitable purpose mentioned in Section 2, of these By-Laws.

Section 8th.

Should the society be suppressed or dissolved by any legal or illegal authority, so that the members thereof should be
18 physically prevented from following their charitable pursuits or to live in community together, according to the rules of the Benedictine Order, the whole property of said society shall be equally divided among all the members of the Society as far as it is not church property and the society had the free disposition of it, so as not to leave them remain destitute of their necessary support, which they are justly entitled to derive from said property for the conservation and augmentation of which they had laboured gratuitously with a view to find their support for a life time.

Section 9th.

In case all the members of this society should agree, although not forcibly compelled to do so, to dissolve this corporation, which would be against the rules of their Order, the whole property shall be forfeited and shall come to the disposition of the Holy See, or its delegate, because the property has been acquired for a great part by pious donations and for the charitable purposes of the Society.

EXHIBIT "E."

Herewith I declare and testify that I, the undersigned, having first obtained the permission of both Rt. Rev. Abbots, namely, the Rt. Rev. Innocent Wolf, Abbot of St. Benedict's in Kansas, and the Rt. Rev. Hilary Pfraengle Abbot of Newark, N. J., do voluntarily

transfer my stability from the Abbey of St. Benedict in Kansas to the Abbey of St. Mary, Newark, N. J.

In faith thereof with my own hand,

[Seal of St. Mary's Abbey, Newark, N. J.]

AUGUSTINE WIRTH, *O. S. B.*,
HILARY PFRAENGLE, *O. S. B.*,
Abbot of St. Mary's, N. J.

Approved, the undersigned Archabbot Bonif. Wimmer, President of the Congregation May 18, 1887.

[Seal of the Parish of the Congregation.]

I give my consent,

INNOCENT WOLF, *O. S. B., Abbot,*
the 15 of May, 1887.

EXHIBIT "F1."

An Act to Incorporate the Order of St. Benedict in New Jersey.

19 1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that Boniface Wimmer, Roman Hill, Oswald Mossmuller, and Peter Henry Lemke and their associates, members of the Society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth, be, and they are hereby, constituted a body politic and corporate by the name, style and title of the "Order of St. Benedict" of New Jersey, to have perpetual succession, to use a common seal, and alter and renew the same at pleasure, to take hold and enjoy lands, tenements and hereditaments, and to make such by laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to, nor inconsistent with the constitution of the United States or of this State; and provided also, that the clear yearly income of the real estate to be held by said corporation, exclusive of the houses occupied by the Order in this state and grounds thereto attached, shall not exceed the sum of three thousand dollars; and provided, that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof.

2. And be it enacted, that the essential objects of said corporation shall be the education of youth and the establishments of churches and conducting service therein.

3. And be it enacted, that no misnomer of the said corporation or their successors shall defeat or annul any gift, grant, devise or bequest to or for their said corporation; provided, that the intent of the party or parties making such gift, grant, devise or bequest, shall sufficiently appear on the face of the deed, will grant or other writing

whereby any estate or interest was intended to pass to or for the said corporation.

4. And be it enacted, that any person or persons now holding or who may hereafter hold any goods, chattels or property, real or personal estate, or interest whatever in trust or for the use of the Order of St. Benedict, in this state or any of the members thereof are hereby authorized to convey, transfer, grant, and make over the same to the corporation hereby created, freed and discharged from all such trusts; provided, that no private rights or vested interest shall be affected or in any way prejudiced by such conveyance to the corporation.

5. And be it enacted, that this act shall be deemed a public act, and take effect immediately.

Approved March 5, 1868.

20 EXHIBIT "F2."

Constitution and By-Laws of the Order of St. Benedict of New Jersey.

SECTION I. The name, style and title of this Corporation shall be the "Order of St. Benedict of New Jersey."

SECTION II. The object of this Corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with principles and general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church.

SECTION III. The officers of the Corporation shall consist of a President, First Vice-President, Second Vice-President, Treasurer and Secretary. The Rt. Rev. Abbot of St. Mary's Abbey, 528 High St., Newark, New Jersey, or the administrators thereof, in case a vacancy shall be ex-officio President; the Very Rev. Prior of St. Mary's Abbey shall be ex-officio First Vice-President, and all Pastors of the Order of St. Benedict in New Jersey whose deeds are held in trust by this Corporation shall be ex-officio Second Vice-President; The President is also acting Treasurer; The Secretary is annually elected by a majority of the members.

SECTION IV. The President shall preside at the meetings, shall call extra meetings, when necessary, and shall have full power to make, execute, sign, seal and deliver all bonds, notes, specialties of any other instruments in writing whatsoever, which shall be necessary to the proper conduction, carrying on and transacting the temporalities of the Order, provided the restriction in the next section is not transgressed.

SECTION V. In all matters relating to the sale of real estate or mortgage of real estate, to deposits, loans or increasing of any indebtedness whatsoever, exceeding the sum of one thousand dollars, in order to be valid must be confirmed by a majority of the members, which at all times shall constitute a quorum.

SECTION VI. The President as Rector of St. Mary's Roman Catholic Church, High Street, Newark, N. J., and Superior of the Order of St. Benedict of New Jersey is also acting Treasurer, and hence shall receive all moneys accruing from St. Mary's Church and the other churches, colleges, houses, and other real estate belonging to or held in trust by the said Order of St. Benedict of New Jersey, paying at the same time close attention that regular accounts of all receipts and disbursements be kept, so as to be able to present a faithful condition of the finances at the regular meetings of the said Order of St. Benedict of New Jersey.

SECTION VII. It shall be the duty of the First Vice-President to preside at the regular meetings, in the absence of the President.

SECTION VIII. It shall be the duty of the Second Vice-Presidents as Rectors of the Churches whose deeds are held in trust by this Corporation to render annual statements of their charge to the President.

SECTION IX. It shall be the duty of the Secretary to keep a minute record of the meetings and conduct the correspondence of the Corporation under the supervision of the President.

SECTION X. To become and to be a member of this Corporation it is absolutely necessary:

1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

2. To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church.

SECTION XI. Membership is lost at once:

1. By being dismissed according to the disciplinary Statutes of the Order of St. Benedict of New Jersey approved of by Pope Pius IX for the American Cassiness Congregation of Benedictines.

2. By voluntar-y leaving the Order for any purpose whatsoever.

3. By joining any other order or secret society or any other religious denominations.

SECTION XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

22 It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

And, moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey.

SECTION XIII. No addition, alteration, or amendment shall be

made to this constitution without a vote of two-thirds majority of the members present.

By-Laws.

Article I. This Corporation shall meet on the last Wednesday of August of each successive year for the promotion of its objects and the transaction of business.

Article II. There shall be an annual meeting on the first Wednesday of February to elect a Secretary and to hear the financial statement of the President.

Article III. Special meetings may be called by the President at or without the request of the members.

Article IV. A majority of all the members shall at all times constitute a quorum to transact business.

Article V. The revenues and disbursements of churches and colleges are received and made by the respective rectors of such institutions and a detailed statement of all sent to the President.

Article VI. All expenditures exceeding one hundred dollars and made by rectors of churches and colleges belonging to or under the charge of this Corporation shall be invalid unless approved of in writing by the President.

Article VII. The same rule in reference to the amendment of the constitution shall also apply to the By-Laws.

EXHIBIT F3.

From National Bank of Mankato.....	$1,060.00
From Marie and Michael Lunzer, proceeds of note and mortgage	181.50
From Kate Sprunck, proceeds of note and mortgage...	283.15
	$1,524.65

23 Note and mortgage of Rudolph and Emma Steinfeld upon certain property situated in the City of Minneapolis, County of Hennepin, Minnesota, described at follows, Lot 2, block 8, Cutter's Addition to Minneapolis, which said mortgages was duly foreclosed and said premises sold to Albert Steinhauser administrator of the estate of Augustin Wirth deceased for the sum of $528.15 on May 27th, 1907, and a sheriff's certificate of sale on foreclosure duly issued to said Albert Steinhauser as such administrator, dated May 27, 1907, and recorded May 29th, 1907, in the office of the Register of Deeds in and for the County of Hennepin, at 10 o'clock A. M. in book 617 of Deeds on page 83, and that there is now due on said certificate of foreclosure said sum of $528.15 with interest thereon at the rate of six per cent per annum from said 27th day of May, 1907.

Note and mortgage of Ignaz and Elizabeth Horvath upon certain property situated in the City of St. Paul, County of Ramsey, Minnesota described as follows: Lot 16, block 1, Neuru and Wallraff's Addition to St. Paul, which said mortgage was duly foreclosed and

said premises sold to Albert Steinhauser, administrator of the estate of Augustin Wirth, deceased for the sum of $308.70 on May 28th, 1907, and a sheriff's certificate of sale on foreclosure duly issued to said Albert Steinhauser as such administrator, dated May 28th, 1907, and recorded May 29th, 1907, in the office of the Register of deeds in and for the County of Ramsey, at 11:30 o'clock A. M. in book 536 of Deeds on page 107, and that there is [not] due on said certificate of foreclosure said sum of $368.70 with interest thereon at the rate of six per cent per annum from said 28th day of May, 1907.

Endorsed: Bill. Filed Aug. 19, 1907. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States of America, District of Minnesota, Second Division.

The President of the United States of America to Albert Steinhauser, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of October next, at the city of Mankato, then and there to answer the Bill of Complaint of the Order of St. Benedict of New Jersey, a citizen of the State of New Jersey, filed against you on the 19th day of August, A. D. 1907; hence fail not.

24 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of August, 1907.

Issued at my office in the City of Mankato, under the seal of said Circuit Court, the day and year last aforesaid.

[SEAL.] HENRY D. LANG, *Clerk*,
By MAMIE A. CARLSON, *Deputy*.

MEMORANDUM.—The above named defendant to enter his appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill be taken pro confesso.

HENRY D. LANG, *Clerk*,
By MAMIE A. CARLSON, *Deputy*.

ALBERT SCHALLER,
Complainant's Solicitor.

Return of Service of Writ.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Chancery Subpœna on the therein named Albert Steinhauser individually and

as Administrator of the goods, chattels and credits of Augustin Wirth deceased by handing to and leaving a true and correct copy thereof with him personally at New Ulm, in said District on the 26th day of August, A. D. 1907.

WM. H. GRIMSHAW,
U. S. Marshal,
By S. J. PICHA, *Deputy.*

Endorsed: Returnable to October Rules, 1907. Returned into the Clerk's Office and filed this 3rd day of September, A. D. 1907. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

Circuit Court of the United States within and for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

Demurrer.

The Demurrer of the Defendant, Albert Steinhauser, as Administrator of the Goods,, Chattels, and Credits of Augustin Wirth, to the Bill of the Order of St. Benedict of New Jersey.

25 This defendant by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's bill to be true, in such manner and form as the same is therein set forth and alleged, doth demur thereto:

First. That no case is stated in or by said Bill authorizing the Court to grant the relief sought, or any other relief.

Second. That it appears by complainant's own showing by said bill that complainant is not entitled to the relief prayed by said Bill against this defendant.

Third. That said Bill of complainant is wholly without equity.

Fourth. That it appears in and by said Bill that the causes of complaint are stale, and that so long a time has past since the matters and things complained of took place that it would be contrary to equity and good conscience for a court to take cognizance thereof, or to enforce any further or other answer thereto.

Fifth. That it appears in and by said bill that more than six years have elapsed since the alleged cause of complaint accrued to the complainant whereby said cause of action and cause of complaint hath become barred by the Statute of Limitation in such cases made and provided.

Sixth. That it appears in and by said Bill that more than one and one-half years have elapsed since the time of granting of the Letters of Administration to, and the appointment of, defendant as administrator of the said Goods, Chattels and Credits of said Augustin Wirth deceased, by the Probate Court of Brown County in the State of Minnesota, and that the time fixed by said Probate

Court and by the statutes of said State for complainant to present and file its claims and demands against said estate of Augustin Wirth, deceased, to said Probate Court, as required by the laws of the State of Minnesota, and especially under Sections 3727, 3730 and 3732 of the Revised Laws of the State of Minnesota, 1905, has expired whereby said cause of complaint has become barred by the Statute of Limitations of Minnesota and by the Laws of said State, in such case made and provided.

Seventh. That it appears in and by said Bill that more than five years have elapsed since the death of defendant's intestate, Augustin Wirth, and that no claim or demand for or of the matters and things complained of in complainant's Bill have ever been presented to or allowed by the Probate Court of Brown County, Minnesota, and that no other Court of competent jurisdiction has ever
26 allowed the same as against said estate, and that the time fixed by the laws of the State of Minnesota, and especially by Section 3733 of the Revised Laws of Minnesota, 1905, has expired whereby said cause of complaint has become barred by the Statute of Limitations of Minnesota and by the Laws of said State, in such case made and provided.

Eighth. That it appears in and by said Bill that complainant has not filed, or presented, a claim or demand to the Probate Court of Brown County, Minnesota, of and for its alleged claim and right to said books, copyrights, contracts, money and property as alleged by complain[illegible] in its said Bill, and that said complainant has not commenced a [illegible] in the Circuit Court of the United States, within and for the District of Minnesota, or any of the Courts of the State of Minnesota, to establish and make lawful such claim, and has not obtained from any court of competent jurisdiction an adjudication to the effect that its said claims and demands are proper, lawful or legal claims or demands against the estate of said Augustin Wirth, deceased, wherefor- this court has no jurisdiction.

Ninth. That this Court has no jurisdiction of the subject matter of the action and the Probate Court of Brown County, Minnesota, has exclusive jurisdiction of the subject matter of this action.

Tenth. That it appears in and by said Bill that there are divers other persons and corporations that are necessary parties to said Bill but who are not made parties thereto, and in particular it appears that the Orders or Societies called in said Bill, the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, and the Abbot of St. Benedict in Kansas, and each of them, is a necessary party to said Bill.

Eleventh. Because there is no equity in said Bill and said complainant has an adequate remedy at law.

Wherefore, and for divers other good causes of demur appearing on the said Bill of Complaint, this defendant demurs thereto and prays the judgment of this Honorable Court whether he shall be compelled to make any answer to said Bill and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

CHAS. L. BURR,

Solicitor and of Counsel for Defendant, 34 Nassau Street, Borough of Manhattan, New York City.

27 *Certificate of Counsel.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Dated, New York City, October 19, 1907.

CHAS. L. BURR,
Of Counsel for Defendant.

Circuit Court of the United States within and for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

UNITED STATES OF AMERICA,
State and Second Division of Minnesota,
County of Brown, ss:

Albert Steinhauser being first duly sworn upon oath says that he is the defendant in the above entitled action and that the Demurrer herewith interposed to the Bill of Complaint is not made, or interposed, for the purpose of delay.

ALBERT STEINHAUSER.

Sworn to before me this 24 day of October, 1907.

[SEAL.] HELEN H. SCHAEFER,
Notary Public, Brown County, Minnesota.

My Commission expires Nov. 19, 1908.

Endorsed: Demurrer. Due service of a copy of the within Demurrer is hereby admitted this 19th day of October, 1907. Albert Schaller, Attorney for Complainant. Filed Nov. 2, 1907. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States, District of Minnesota, 2nd Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
vs.
ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

Pursuant to the stipulation of the solicitors for the respective parties to the above entitled action and with the consent of the Court, the above entitled cause came duly on for argument on the demurrer interposed by the defendant to the complainant's complaint,
28 on Saturday, the 16th day of January, 1909 at 10 o'clock in the forenoon in the City of Minneapolis, Minnesota;

And after hearing counsel for the parties and being fully advised;
It is Hereby Ordered: That the demurrer of the defendant to the complainant's complaint in the above entitled cause, be and the same is hereby overruled with leave to the defendant to file his answer to said complaint on or before the 16th day of February, 1909.
Dated this 22nd day of January, 1909.

MILTON D. PURDY, *Judge.*

Endorsed: Order overruling Demurrer. Filed Jan'y 29th, 1909. Henry D. Lang, Clerk. By Geo. F. Hitchcock, Jr., Deputy.

In the Circuit Court of the United States in and for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits *and* Augustin Wirth, Defendant.

Answer of Albert Steinhauser, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant, to the Bill of Complaint of the Order of St. Benedict of New Jersey, Complainant.

The defendant, now and at all times hereinafter saving unto himself all and all manner of benefit or advantage of exception or otherwise, that can or may be had, or taken, to the many errors, uncertainties and imperfections in said Bill of Complaint contained, and for answer thereto, or so much thereof as this defendant is advised it is necessary or material to make answer to, answering says:
First. Defendant admits:
That the matter and amount in controversy herein exceeds the sum in value of Two Thousand ($2,000.00) Dollars exclusive of interest and costs; that this defendant is a citizen of the State of Minnesota; that Augustin Wirth died intestate in the County of Brown, State of Minnesota on or about the 19th day of December, 1901; that on the 16th day of March, 1904 Letters of Administration were granted and issued to this defendant pursuant to a decree made and entered by the Judge of the Probate Court, of the
29 County of Brown, State of Minnesota, and that said decree was made upon certain papers in which among other things, it was alleged that said Augustin Wirth was a resident at the time of his death of said County of Brown and left personal property in said County and in said State of Minnesota; that Louis G. Benziger and Nicholas C. Benziger are and have been publishers doing business in the City of New York and State of New York under the firm name of Benziger Brothers, that said Augustin Wirth was the author of the following books; "Hunolt Sermons"; "New May Devotions"; "The Confessional"; "Eight Short Practical Sermons on Mixed Marriages"; "New and Old Sermons"; "The Seven Last Words on the Cross"; "Two Retreats for Sisters"; Thoughts and Counsel for

the Consideration of Young Men"; "Lenten Sermons"; "Funeral Sermons"; "The Two-Edged Sword"; "The Sacrament of Penance"; and for the purpose of obtaining copyrights thereof said Augustin Wirth had, prior to the 23rd day of July, 1897 filed with and deposited in the office of the Librarian of Congress of the United States, the statement, affidavits and application required by law, together with a printed copy of the title page of each of said books, and within ten days of the publication of each of said books, two printed copies thereof, and that each of said books had printed on the title page, on the page following thereof, the notice required by law that the same had been duly entered, giving the year, in the office of the Librarian of Congress, Washington, D. C., and that said Augustin Wirth duly copyrighted each of said books under and in accordance with the then existing Copyright Laws of the United States by complying in all respects with the conditions and requirements of said laws whereby there was secured to said Augustin Wirth and his assigns during his life time, and to his executors, administrators or assigns upon his death, for the term of twenty-eight years from the date of the copyright of each of said books respectively, the full and exclusive right of printing, publishing and vending said books aforesaid, throughout the United States, and that during said period aforesaid, and from time to time said Benziger Brothers in the usual course of their said business of buying and selling books, bought of said Augustin Wirth for re-sale and sold many of his said copyrighted books; that on or about the 23rd day of July, 1897, Benziger Brothers and said Augustin Wirth entered into a certain written contract and agreement wherein and whereby it was agreed, among other things, that said Augustin Wirth should give to Benziger Brothers herein the exclusive sale of "Hunold Sermons," five volumes, for the term of ten years and to deliver to them the complete stock of said books that he then had on hand, that said Benziger Brothers agreed to print and bind said books when they had to be re-printed, the charge for paper, printing and binding to be paid by said Augustin Wirth at cost price and that said Augustin Wirth agreed to furnish to Benziger Brothers said "Hunolt Sermons" at fifty per cent discount from the advertised price and that at the expiration of ten years from the date of the agreement, the agreement being dated the 23rd day of July, 1897, the plates of the five volumes of said "Hunolt Sermons" were to become the property of Benziger Brothers with the right to publish the work without paying any royalty thereon, together with the stock then on hand, and that Benziger Brothers were to have the right to buy at cost price all paper, printing and binding of the same; that in and by said contract said Wirth further agreed to give to Benziger Brothers for a term of three years, and thereafter until six months' notice was given, by either of said parties of the termination of the contract, the exclusive sale of his other said books named hereinbefore, namely, "New May Devotions", "The Confessional", "Eight Short Practical Sermons on Mixed Marriages", "The Last Seven Words on the Cross", "New and Old Sermons", "Two Retreats for Sisters", "Thoughts and Counsels for

the Consideration of Young Men", "Lenten Sermons", "Funeral Sermons", "The Two-Edged Sword", "The Sacrament of Penance", that in and by said contract and agreement said Wirth agreed to deliver to Benziger Brothers not less than three months from the date of the said agreement, the complete stock, then had on hand of the above mentioned books and that when any of said books had to be reprinted Benziger Brothers agreed to order the paper and have the printing and binding done, charging the printing and binding at the cost price to said Wirth; that said Wirth further agreed, therein and thereby, to furnish the herein last mentioned books to Benziger Brothers at a discount of forty per cent from the advertised sale prices and that Benziger Brothers agreed to make payment of the moneys due said Augustin Wirth from the sale of his books during the months of October, January, April and July of each year and to treat said books as their own publications and put them in their catalogue of publications; that said Wirth delivered to them his stock of said copyrighted books prior to July 23, 1897, and immediately thereafter they entered upon the performance of their said contract and agreement and between said 23rd day of July, 1897, and the 19th day of December, 1901, the date of the death of Augustin Wirth, sold said copyrighted books and publications and during the months of October, 1897, January, April, July and October of the years 1898, 1899 and 1900, and during the months of January, April and July of the year 1901, duly accounted in accordance with the terms of said contract
31 and agreement for all sales of said copyrighted books and publications made by them during the preceding three months and for the cost of paper, printing and binding disbursed by them under said contract and agreement and during each of said months aforesaid paid to said Augustin Wirth the several amounts they found to be due on account of the sales made by virtue and under the conditions of said contract and that on the 19th day of December, 1901, there was due on account of said sales made under said contract during the months of October, November and December of said year the sum of $175.40; that after the death of said Augustin Wirth they continued to sell and are still selling under and by virtue of said contract and agreement said copyrighted books and publications of said Augustin Wirth; that said Augustin Wirth was, in his lifetime, a Catholic Priest; that on the 17th day of October, 1906, an action at law was commenced in the United States Circuit Court for the Southern District of New York by this defendant as administrator of the Goods, Chattels and credits of Augustin Wirth, deceased, as plaintiff therein, against Benziger Brothers as defendants therein, the object of said suit being to recover from said defendants a sum of money equal in amount to the various sums in the Bill of Complaint in this cause set forth; that said Benziger Brothers on the 15th day of December, 1906 brought an action in the same Court and in the same District on the equity side of the Court against this defendant to enjoin the action at law just mentioned and to adjudge that the equitable title to the copyrights mentioned were in the complainant herein and that the payments al-

leged to have been made by Benziger Brothers to the complainant herein were valid payments and that the complainant herein was entitled to the moneys so paid and that said action is now pending; that this defendant as administrator of the estate of Augustine Wirth, deceased has in his hands and possession, certain moneys and the proceeds of certain notes and mortgages which have been foreclosed by him as such administrator and the record title to which now is in this defendant as such administrator; the said moneys and property being described and set out in Exhibit "F-3" attached to the Bill of Complaint herein, less, however, proper and legal disbursements heretofore made by him in the course of administration proceedings in said estate.

Second. This defendants denies:

That Augustin Wirth was for many years prior to the date of his death, December 19, 1901, a resident of the County of Essex State of New Jersey; that the result of the work of the Order of St. Benedict was the civilization of Europe; that at the time of his death
32 Augustin Wirth was a member of the corporation known as the Order of St. Benedict of the State of New Jersey; that the significance of the vow of poverty, of said Order of St. Benedict, was the giving up of the right of possession temporal goods and the transfer of all property to the "Community" of members and that the taking of the vow was always accompanied by an actual transfer by the member to the Society of all temporal goods which he then possessed and by an agreement that he should henceforth assign to it whatever he might acquire; that the significance of the vow of obedience was to deprive the member of his individual liberty as regards temporal things and to subject himself to the absolute control as to his movements [of] the monastic authority of the Order; that wherever a member's work might be he was required to account for all money he received and to pay the same to his Abbot; that upon a person becoming a member of the Order of St. Benedict and taking the vows mentioned in said bill of complaint, the Order agreed on its part to maintain and support the member for life, in sickness and in health, and in case of a transfer the new Abbey assumed the agreement of maintenance; that Augustin Wirth made the vows in said bill of complaint set forth at St. Vincent's of Westmoreland County, Pennsylvania; that said Augustin Wirth in May, 1887, transferred his vows to St. Mary's Abbey of Newark, New Jersey; that Exhibit "E" is a copy of the transfer of said vows of said Wirth; that the effect of said transfer, either according to the Canon Law (of the Society) or otherwise, or according to the community agreement of the members, and as understood and intended by the parties, was to vest in the complainant all rights that the original Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania, had in the property of said Augustin Wirth and in all the property he might thereafter acquire; that from May, 1887 down to the time of his death, December 19, 1901, Augustin Wirth remained a member of St. Mary's Abbey and the complainant *and* during all said time received his maintenance and support from said Society and Order; that before the publication and sale of his said

books by Benziger Brothers he was assisted by the members of the Order in the publication, sale and delivery of said books and that by special permission of his Abbot he was at times relieved of his educational, charitable and religious work that the publication and sale of his books might be conducted with greater profit to the Order; that the reasonable and actual value of said maintenance, nursing and care of said Augustin Wirth, and said assistance given to him in connection with the publication and sale of his said books far exceeded the value of the copyrights of said books and all profits from the sale of the same prior to the commencement of this action
33 and all profits that will hereafter accrue; and all other property of the estate of said Augustin Wirth; that said Augustin Wirth during his lifetime, as required by the rules and regulations of the complainant accepted for moneys received by him in his work including moneys paid to him by Benziger Brothers except at such times when for reason an accounting was waived by said Order; that at times with the special permission of his superior said Augustin Wirth held and dispensed said moneys for the benefit of the Order and the community for educational, religious and charitable purposes; that said permission was revocable at any time; that said permission was in force at the time, or a part of the time, of the payments of money made to him by the Complainants as set up in said Bill; that on or about the 20th day of June, 1899 said permission was revoked by the Abbott of New Jersey and the Abbott Primate of Rome and from that time said Augustin Wirth was required to account to the Abbott of New Jersey for all moneys he received; that the complainant and its members performed their contract at all times to maintain said Augustin Wirth, but that said Augustin Wirth failed in his life-time to transfer and assign to the complainant the copyrights obtained by him as aforesaid and that in equity and law the complainant is entitled to said copyrights and all the benefits and moneys arising therefrom; that said Augustin Wirth left no debts or unsatisfied demands against his estate at the time of his death; that Augustin Wirth left him surviving certain nephews and nieces in the State of Minnesota as his only next of kin; that by reason of the facts alleged in said Bill of Complaint, the equitable title of the copyrights and other property mentioned in said Bill of Complaint is in the complainant and that the payments alleged by said Bill to have been made by Benziger Brothers to the complainant were valid payments and that said order was entitled to the money so paid and not this defendant as administrator of Augustin Wirth, deceased; that the acts and doings of the defendants therein complained of are contrary to equity and good conscience and tend to the manifest injury of complainant in the premises.

Third. Defendant has never seen the original of said written Contract and agreement made between said Augustin Wirth and Benziger Brothers, dated on or about the 23rd day of July, 1897 and does not know that the copy annexed to said Bill of Complaint and marked "Exhibit A" is a true copy thereof and to the end that said

original may be produced and put in evidence before your
34 Honors, this defendant, therefore, denies that said copy is a true copy of said original contract and agreement.

Fourth. That as to whether or not the complainant is a religious corporation created by and existing under the laws of the State of New Jersey; whether or not said complainant made written demand upon Benziger Brothers for all moneys arising under said contract between Benziger Brothers and said Wirth subsequent to the date of his death; whether or not on the 2nd day of June, 1902, Benziger Brothers paid to said Order, upon its written demand, $349.00; whether or not on the following dates Benziger Brothers paid to said Order the amounts set opposite each, upon its written demand, viz:

On the 15th day of July, 1902	$53.20
On the 9th day of October, 1902	186.50
On the 20th day of January, 1903	102.22
On the 29th day of April, 1903	246.45
On the 31st day of July, 1903	39.50
On the 21st day of October, 1903	125.90
On the 20th day of January, 1904	157.80
On the 13th day of April, 1904	200.95
On the 14th day of July, 1904	107.80
On the 12th day of October, 1904	148.77
On the 26th day of January, 1905	168.10
On the 19th day of April, 1905	224.85
On the 26th day of July, 1905	112.45
On the 28th day of October, 1905	200.00
On the 22nd day of January, 1906	156.45
On the 13th day of April, 1906	175.95
On the 16th day of July, 1906	158.10
On the 17th day of October, 1906	153.45
On the 24th day of January, 1907	200.00

Whether or not said amounts were amounts due upon said contract; whether or not the complainant was established by St. Benedict in the Fifth or Sixth Centuries at Sublace and Monte Cassino, Italy, for the purposes set forth in complainant's said Bill: whether or not the organization of said Order was sanctioned and approved by the highest authority of the Catholic Church in Rome, namely, The Pope; whether or not to become a member it was necessary at the time of making the profession to take what were described as vows of chastity, poverty and obedience; whether or not at the organization of the Order, St. Benedict, the founder thereof, formulated in Latin a rule known as "The Rule of St. Benedict," which in terms regulated the government of the Order; whether or not the copy annexed to complainant's Bill and marked "Exhibit B" is
a copy in the English language of one of the chapters of
35 said Rule; whether or not under the original Rule formulated by St. Benedict the community, composed of the members of the Order, could hold and acquire real estate, and later could

acquire personal property, such ownership and possession being an ownership and possession in common for the uses and objects of the Order; whether or not a member was sent into a new field of work in which case he transferred his vows to the Abbey to which he went; whether or not in special cases, with his Abbot's consent, he might himself dispense the money for the benefit of the Order and community for the objects of the Order; whether or not such consent was always revocable; whether or not the Order of St. Benedict spread all over Europe and in later times to the United States of America; whether or not the first Order in the United States was established in or about 1846 and was known as the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania; whether or not Exhibits D-1 and D-2, annexed to and made a part of complainant's Bill of Complaint are copies of the Act of Incorporation of the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, and of its By-Laws respectively; whether or not Augustin Wirth was sent as a Prior by the Order of St. Benedictine in Westmoreland County, Pennsylvania, to Atchison, Kansas, in the year 1865 to take charge of and conduct there St. Benedict's Monastery, St. Benedict's College and St. Benedict's Church, and that his work continued in Atchison until the month of May, 1887; whether or not St. Mary's Abbey is incorporated in the State of New Jersey under the corporate name and style of "The Order of St. Benedict of New Jersey"; whether or not the copy of Section 12 of the Constitution of said Order set out in paragraph Eighth of complainant's said Bill is a true copy of Section 12 of the Constitution of said Order; whether or not Exhibits F-1 and F-2 annexed to and made a part of complainant's said Bill are true copies of the act of incorporation of said complainant and of its Constitution and By-Laws; whether or not during the period from May 1887 to December 17, 1901, said Augustin Wirth, by permission from said Abbey in Newark, New Jersey, was permitted to build a church and take care of a congregation in Springfield, Minnesota; whether or not said Wirth carried on his religious and charitable works in the State of New Jersey from May, 1887 to August, 1898, and continued his work in Springfield, Minnesota, at the time of his death; whether or not the complainant as a corporation, has not received a greater amount of income or principal of personal or real estate than is permitted *them* by the laws of the State of New Jersey and that this will be so even though the Court award the judgment in said
36 Bill of Complaint prayed for; whether or not the facts stated in said Bill of Complaint cannot be set up as a defense in said action at law brought by this defendant against Benziger Brothers for the reason that the same constitute an equitable defense which cannot be pleaded in an action at law; whether or not the complainant is remediless in the premises at and by the strict rule of the common law and only relievable in a court of equity; whether or not Exhibit "C," which is annexed to and made a part of said Bill of Complaint is a true copy or true translation of an original vow which Augustin Wirth made at St. Vincent's; whether or not the members of said Order at times, and in some cases covering

long periods, nursed and cared for Augustin Wirth during sickness; whether or not the amount sought to be recovered in said action at law is the amount which Benziger Brothers have paid to said Order, this defendant has not sufficient information on which to base a belief, and therefore denies the same.

Fifth. The defendant alleges:

That said Augustin Wirth was for many years prior to the 19th day of December, 1901, a resident of the County of Brown and State of Minnesota, and a citizen of the State of Minnesota, and that upon his death at said time he left surviving him the following as his next of kin and heirs at law:

Valentine Wirth
Regina Weigand and
Florian Wirth.

This Defendant Further Answering said Bill of Complaint Alleges and Says:

Sixth. That said Augustin Wirth during his lifetime was the author of all of said books aforesaid and as such was entitled to and did copyright the same as in said Bill of Complaint alleged; that for a great many years prior to his death he was engaged in business in and upon his own account and was possessed of moneys and property and received, used, held and disposed of the same, and made investments thereof in and under his own name; and in and under his own name was engaged in writing, printing, publishing and vending his said books and literary works and contracting for the publishing and vending thereof and receiving the proceeds thereof to his own use and benefit, all of which was during all of said time and up to the time of his death well known to the complainant and to its officers and those in authority in complainant's organization. That the complainant with full knowledge of said course of dealing and conduct and business on the part of said Augustin Wirth in respect to such moneys and property, claimed and possessed by him, made no demand or claim thereto and acquiesced in said possession, use and claim by said Augustin Wirth; and made no objection or demand to the contract set out in said Bill of Complaint and the fulfillment thereof by the said firm of Benziger Brothers with the said Augustin Wirth, nor claimed any right thereunder, but on the contrary permitted and allowed, without objection, the said Augustin Wirth to deal with the said Benziger Brothers and all other persons the same as if the complainant neither had nor claimed any interest in any of the property possessed by the said Augustin Wirth. Nor did the complainant at any time during all these years make claim or assert that the said Augustin Wirth was not the owner of said copyrights or the proprietor of said books and copyrights. That for a long time prior to his death and up to and at the time of his death, Augustin Wirth was possessed of and held and claimed as his own certain moneys and property, including all of the property mentioned and set out in the Bill of Complaint herein. And by reason of the long acquiescence of the complainant in said ownership and claim of ownership in said property by the said Augustin Wirth continuing up to the time of and even after his

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death, the said complainant has placed a construction upon its said membership contract sought to be set out and alleged in said Bill of Complaint which now estops it from questioning or disputing the title and ownership of the said Augustin Wirth in and to all of the property set out and referred to in said Bill of Complaint; and by reason thereof and of the facts in this paragraph alleged, the complainant is estopped from now claiming to own said property or any part thereof; and is estopped from claiming that the said payments of moneys set out in said Bill of Complaint made by Benziger Brothers to the complainant are valid payments or that the complainant was entitled to receive and retain the same or any part thereof.

This Defendant Further Answering Said Bill of Complaint Alleges and Says:

Seventh. That the complainant herein and its principal officers, managing agents and other persons in authority and acting for it, whose names are to the defendant unknown, have for many years had and maintained an intimate business relation with the members of the said firm of Benziger Brothers; that immediately after the death of the said Augustin Wirth the complainant and its said officers entered into a combination, confederacy and conspiracy, and into some kind or sort of a combination and agreement, the
38 exact terms and nature of which are unknown to this defendant, to cheat, wrong, and defraud the heirs at law and the next of kin of said Augustin Wirth, deceased, and the personal representative of the estate of said deceased, and the creditors of said estate, out of said moneys due and to become due under said contract set out in the Bill of Complaint of Benziger Brothers with Augustin Wirth, and out of said copyrights; and made certain fraudulent wrongful and unlawful agreements, the exact terms and nature of which this defendant is now ignorant, but wherein and whereby it was agreed, as this defendant is informed and believes, on the part of complainant and said Benziger Brothers, that if said Benziger Brothers would make said payments aforesaid due upon said contract to said complainant or its officers, agents or managers, that said complainant would protect and save Benziger Brothers harmless in the premises from and against any and all claim and demand thereafter made therefor, of the said Benziger Brothers by either this defendant or other personal representative of said Augustin Wirth, or his heirs at law and next of kin, in all suits at law or actions in equity which might be instituted against said Benziger Brothers upon or concerning said contract, and from the re-payment of said sums, together with all costs and attorneys' fees, which the said Benziger Brothers might incur. And in so doing and in carrying out said fraudulent agreement and for the purpose of effecting the same, the complainant and its officers concealed and caused to be [*sequested*] and concealed from the next of kin of the said Augustin Wirth and from his personal representative and from this defendant, all knowledge of the existence of any such contract as set out in said Bill of Complaint, and of any moneys due thereon and of all other property owned and possessed by said Augustin

Wirth at the time of his death. And because of such acts and conduct on the part of complainant and its said officers and managing agents, it is not entitled to claim that the payments so made upon said contract by Benziger Brothers to it are valid payments; and is not entitled to claim and ought not to be permitted to claim that it is the owner of the said moneys so paid and received by it or to retain the same.

This Defendant Further Answering said Amended Bill of Complaint, Alleges and Says:

Eighth. The Probate Court of Brown County in the State of Minnesota, is, and at all times herein mentioned was, a Court of Record having exclusive jurisdiction over, and concerning, the estates of deceased persons residing at the time of death in said County, and that said Court at all times herein mentioned
39 had, and now has, the exclusive jurisdiction of all matters and proceedings in and about and concerning the estate of Augustin Wirth, deceased, the administration thereof, and the assets, property and rights belonging to said Augustin Wirth at the date of his death and over and concerning all claims and demands of every person or persons whomsoever arising at law or in equity by virtue of contract, express or implied, contingent or otherwise, which might, or could, in any manner or way, affect the estate of said Augustin Wirth, deceased, or the property or rights of said Augustin Wirth at the date of his death, or the rights of his heirs at law, next of kin, administrators and creditors, and of any action that could be maintained against the administrator of said estate, and the claim or demand of said complainant was not a contingent claim, but was a claim or demand required by the Laws of the State of Minnesota to be filed in said proceedings in said Court and presented to said Probate Court and demanded of said administrator. And the said Probate Court of Brown County, Minnesota, having such exclusive jurisdiction, and after due and lawful notice on or about the said 16th day of March A. D. 1904, in said matter or proceeding of the estate of said Augustin Wirth, deceased, therein then pending duly made and entered, under, and in pursuance of, the Laws of the State of Minnesota, and as recorded in the records of said Court, its decree and order, not only duly appointing this defendant the administrator of the Goods, Chattels and Credits of said Augustin Wirth, deceased, but also made further order and decree therein on or about said date limiting the time and requiring creditors of said estate to file their claims and demands against said estate of said decedent and duly made an order fixing a date within which all creditors and persons were permitted to present to said Court, or file their claims or demands in said proceedings concerning said estate, and the administration thereof, or against the administrator thereof, arising at law or in equity, contingent or otherwise, and fixing the time when, and the place where, proof should be heard upon such claims, or demands, and fixing a time when such claims, or demands, should be examined and adjusted as provided by the Laws of said State of Minnesota, and said decree and order limited such time to, and fixed the last date for the presentment and filing of such claims and de-

mands as the first Monday of December, 1904, and under the Laws of the State of Minnesota, at all times herein mentioned, and now, in force, and especially under Sections thereof now known as Sections 3727 and 3730 and 3733 of Chapter 74 of the Revised Laws of the State of Minnesota, 1905, said claim or demand of the complainant herein was not presented to said Court, or to said
40 administrator, this defendant, or filed in said proceedings in said Probate Court of Brown County, Minnesota, and no such claim or demand was ever presented at any time to said Court or to said administrator, this defendant, or filed in said proceeding in said Court by any person or persons whomsoever, and the said claim, or demand or pretense of claim, or demand, of said complainant now set up in this action became, and is now, and was, forever barred, and no action at law or in equity can now be maintained thereon, by said complainant for the reason that said statutory law is mandatory not only upon the Courts of the State of Minnesota, but also upon all the Courts of the United States, enforcing claims or demands against executors or administrators of the decedent's estate which, said Courts, administering the laws of the State of the domicile, are bound by the same rule and the same law that governs and binds the Minnesota tribunals. And among some of the Laws of the State of Minnesota at all times herein mentioned and now in force prohibiting this action against this defendant, and forever barring the claim, or demand, of complainant herein, appearing on the statutes of said State is the provision now known as Section 3730 of Chapter 74 of the Laws of Minnesota of 1905, which declares that all claims against the estate of the decedent, arising upon contract, whether due, not due, or contingent, must be presented to the Court of Probate administering the estate for allowance within the time fixed by the order or be forever barred, and the provisions of said law at all times herein mentioned and now in force now known as Section 3733 of said Chapter 74 of Laws of Minnesota, 1905, which declares that "No action at law shall lie against an executor or an administrator for the recovery of money upon any demand against the decedent allowable by the Probate Court, and no claim against a decedent shall be a charge upon his estate unless presented to the Probate Court, for allowance within five years after his death." And the said complainant not having presented to, or filed in said Probate Court of Brown County its said claim, or demand, in said proceeding, within the time fixed by said Probate Court, nor within the period fixed by said Law; and the said Augustin Wirth having died in the month of December, 1901, and more than five years having elapsed since the death of said Augustin Wirth, this action against this administrator ought not to be permitted, and the same should be dismissed, and defendant should go hence out of Court without day, and complainant should pay the costs of this action.

And this Defendant Further Answering said Bill Alleges and says:

41 Ninth. There is no case stated by said Bill authorizing the court to grant the relief sought by complainant in and by the same; that said bill is wholly without equity, and the causes of com-

plaint herein made by complainant are stale, and so long a time has passed since the matters and things complained of took place, and complainant having full knowledge thereof for so many years, and having waited until after the death of said Augustin Wirth, when it should, in equity and good conscience, have made and claimed all the alleged rights now set up in said Bill prior to his death; and having failed, refused and neglected so to do, it would be, and now is, contrary to equity and good conscience for a Court to take cognizance thereof; and that complainant has or had before the same became barred as herein alleged, a full, complete and adequate remedy at law; and there is no equity in said Bill.

This Defendant Further Answering said Bill Alleges and Says:

Tenth. Augustin Wirth died intestate on the 19th day of December, 1901, and for many years prior thereto had been and was a resident and citizen of the County of Brown, State of Minnesota; that at the time of his death the Laws of the State of Minnesota declared that no action against an executor or administrator should lie, be commenced or maintained for the recovery of money upon any demand, against a decedent, allowable by a Probate Court of said State, and no claim against a decedent should or shall be a charge upon his estate unless presented to such Probate Court for allowance, within five years after his death and no such demand having been made by complainant and no such claim against said decedent, having been filed in said proceeding in the Matter of the Estate of said decedent in said Probate Court, nor presented to said Probate Court or decedent's said administrator for allowance by complainant, notwithstanding the claim and demand of complainant is one required by the Laws of said State to be filed and presented. Nor did it ever at any time make such demand or present or file such a claim against said deceased as now set up in said Bill and up to this date, viz: February A. D. 1909, no such claim or demand has been filed or presented as aforesaid, and complainant not having complied with said Law in any respect, the same is now barred and prohibited by said Laws of said State and the same is not and cannot be a charge upon or against said estate, or any administrator thereof.

And defendant further alleges that the cause of action set up in said Bill of Complaint is barred by the Statute of Limitation of the State of Minnesota for the reason that at the time of the com-
42 mencement of this action more than six years had elapsed since the right of action accrued to the complainant to recover on its contract alleged and set out in said Bill of Complaint, from said Augustin Wirth, the moneys and property held, possessed, and claimed by him and of which he died seized and possessed and which is set out and referred to in said Bill of Complaint, whereby said cause of action, and any cause of action upon the alleged contract sought to be set out and established in said Bill of Complaint have become and now are barred by the Statute of Limitation in such case made and provided.

The said Statute of Limitation referred to is Section 4076 of the Revised Laws of the State of Minnesota, 1905, which provides that actions upon contract, express or implied, for taking or detaining

personal property, including actions for the specific recovery thereof, and actions to enforce a trust or complete an accounting where the trustee has neglected to discharge his trust, or has repudiated the trust relation, cannot be brought after six years from the time such cause of action accrued.

Eleventh. And defendant further alleges that this Honorable Court has not at this time jurisdiction of the parties hereto nor of the subject matter of this action, but that the Probate Court of Brown County, Minnesota, has exclusive jurisdiction of the parties hereto and the subject matter of this action, by reason of the said Statutes of the said State of Minnesota hereinbefore set out and alleged.

Twelfth. And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said Bill of Complaint charged, without this, that there is any other matter, cause or thing in the said complainant's said Bill of Complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

ALBERT STEINHAUSER,
As Administrator of the Goods, Chattels, and Creditors of Augustin Wirth,
By CHAS. L. BURR,
34 *Nassau St., Borough of Manhattan, City of New York, N. Y., and*
PITZER & HAYWARD,
Nebraska City, Nebr., His Solicitors.

43 UNITED STATES OF AMERICA,
District of Minnesota:

STATE OF MINNESOTA,
County of Brown, ss:

Albert Steinhauser makes solemn oath and says:

I am the above named defendant and I am the administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased. So much of the foregoing Answer as concerns my own acts and deeds is true to the best of my knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

ALBERT STEINHAUSER.

Subscribed to in my presence and affirmed to before me this 13, day of February, 1909.

[SEAL.]

N. HENNINGSEN,
Notary Public, Brown County, Minn.

My Commission Expires Oct. 15, 1915.

District Court, Ninth Judicial District.

STATE OF MINNESOTA,
County of Brown, ss:

I, Carl P. Manderfeld Clerk of the District Court of the Ninth Judicial District and County aforesaid, the same being a court of record, do hereby certify that N. Henningsen before whom the annexed instrument was acknowledged, was, at the time of taking such proof or acknowledgment, a Notary Public in and for said County of Brown and State of Minnesota, and sworn, and duly authorized to take the same; that I am well acquainted with the handwriting of such officer, and verily believe that the signature to the said certificate or proof or acknowledgment is genuine.

Witness my hand and the seal of said Court at New Ulm in said County, this 13th day of February, 1909.

[SEAL.] CARL P. MANDERFELD, *Clerk.*

Endorsed: Answer of Albert Steinhauser as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, Defendant, to the Bill of Complainant of the Order of St. Benedict of New Jersey, Complainant. Filed Feb'y 15, 1909. Henry D. Lang, Clerk, by Mamie A. Carlson Deputy.

United States Circuit Court, District of Minnesota, Second Division.

44 THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

The replicant, the Order of St. Benedict of New Jersey, saving and reserving to itself all and all manner of advantages of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Albert Steinhauser, as administrators of the goods, chattels and credits of Augustin Wirth, for replication thereunto says that it does and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendant and that the answer of the defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently re-lied unto, confessed or avoided, traversed or denied is true; all which matters or thing- the replicant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said bill it has already prayed.

Dated March 13th, 1909.

ARNOLD & GREENE,
New York City, and
ALBERT SCHALLER,
Solicitors for Complainant.

314-315 New York Life Building, St. Paul, Minnesota.

Endorsed: Filed M'ch 15, 1909. Henry D. Lang, Clerk, by Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSE-, As Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

Original Bill.

In Equity.

ALBERT STEINHAUSER, As Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Complainant,
against
THE ORDER OF ST. BENEDICT OF NEW JERSEY, Defendant.

45 Cross-bill.

To the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota and the Second Division thereof, in Equity suit:

The above named defendant Albert Steinhauser, as Administrator of the Goods, Chattels and Credits, and of the Etate, of Augustin Wirth, deceased, having heretofore in this cause answered fully [into] the original bill of complaint of the above named complainant, The Order of St. Benedict of New Jersey, now, by leave first obtained therefor, brings this his Cross Bill against the said complainant, The Order of St. Benedict of New Jersey, for affirmative relief, and complains and says:

First. That he, the said Albert Steinhauser, is the Administrator of the Goods, Chattels and Credits and of the Estate, of Augustin Wirth, deceased, duly qualified and acting under authority of Letters of Administration issued to him by the judgment and order of the Probate Court of Brown County, State of Minnesota, on the 16th day of March, 1904; that he is now, and at all times since the filing of said original bill of complaint was, a resident of the Town of New Ulm, in the said County of Brown, State of Minnesota, and is and during all of said time was, a citizen of said State of Minnesota and comes into this Honorable Court in the above entitled cause at the suit of the said The Order of St. Benedict of New Jersey, a corporation duly organized and existing, as he is informed and believes, under and by virtue of the laws of the State of New Jersey, and a resident corporation of the said State of New Jersey.

Second. That the said complainant herein, The Order of St. Benedict of New Jersey, filed in this Honorable Court its said Original Bill in Equity against this defendant on or about the — day of

September, 1907, alleging, among other things, in substance, that the Order of St. Benedict of New Jersey is a corporation duly organized and existing under the Laws of the State of New Jersey and having its principal place of business in the City of Newark, County of Essex and State of New Jersey; that Albert Steinhauser, of the Village of New Ulm, in the County of Brown, State of Minnesota, is a citizen of said State, and administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased; that the amount in controversy exceeds the sum in value of Two thousand (2,000) dollars, exclusive of interest and cost; that on or about the 19th day of December, 1901, Augustin Wirth died intestate in the County of Brown, State of Minnesota; that the 16th day of March, 1904,
46 Letters of Administration of the Goods, Chattels and Credits of said Augustin Wirth, deceased, were granted and issued to Albert Steinhauser, pursuant to decree made and entered by the Judge of the Probate Court of said County of Brown, the said decree being made upon certain papers in which, among other things, it was averred that Augustin Wirth was a resident at the time of his death of the said County of Brown and left personal property in said County and in said State of Minnesota; that said Augustin Wirth was the author of the following books:

"Hunolt Sermons"
"New May Devotions"
"The Confessional"
"Eight Short Practical Sermons on Mixed Marriages"
"New & Old Sermons"
"The Seven Last Words on the Cross"
"Two Retreats for Sisters"
"Thoughts & Counsel for the Consideration of Young Men"
"Lenton Sermons"
"Funeral Sermons"
"The Two Edged Sword"
"The Sacrament of Penance"

and had, prior to the 23rd day of July, 1897, duly copyrighted each of said books under and in accordance with the then existing copyright law of the United States by complying in all respects with the conditions and requirements of said law, whereby there was secured to said Augustin Wirth, and his assigns, during his lifetime, and to his executors, administrators or assigns, upon his death, for the term of twenty-eight years from the date of the copyright of each of said books respectively, the full and exclusive right of printing, publishing and vending said books aforesaid throughout the United States, and that during said period aforesaid, and from time to time, Louis G. Benziger and Nicholas C. Benziger, publishers, doing business in the City of New York, State of New York, under the firm name of Benziger Brothers, in the usual course of their business of buying and selling books, bought of said Augustin Wirth for resale, and sold, many of his said copyrighted books; that on or about June 23, 1897, said Benziger Brothers entered into a written contract and agreement with said Augustin Wirth, a copy whereof is annexed to and made a part of complainant's said original bill of

complaint, and marked Exhibit "A," wherein and whereby said parties agreed among other things as follows: Said Augustin Wirth agreed to give to said Benziger Brothers the exclusive sale of "Hunolt Sermons" for the term of ten years and to deliver to them his complete stock of said books then on hand; that Benziger Brothers agreed to print and bind said books when they had to be
47 reprinted, the charge for paper, printing and binding to be paid by said Augustin Wirth at the cost price; said Augustin Wirth agreed to furnish said "Hunolt Sermons" to Benziger Brothers at fifty (50) per cent discount from the advertised price; at the expiration of ten years from the date of said agreement the plates of the five volumes of said "Hunolt Sermons" were to become the property of Benziger Brothers, with the right to publish the work without paying any royalty thereon, together with stock then on hand; said Benziger Brothers reserving the right to buy at cost price all paper, printing and binding of the same; said Augustin Wirth further agreed to give to said Benziger Brothers for the term of three years, and thereafter until six months' notice was given by either party of the termination of the contract, the exclusive sale of his other said books hereinbefore enumerated, said Wirth agreeing, also, to deliver, to Benziger Brothers, not later than three months from the date of said agreement, the complete stock he then had on hand of said last above mentioned books and that when said books had to be reprinted, Benziger Brothers agreed to have said reprinting and binding done, charging the printing and binding to said Augustin Wirth at the cost price; said Augustin Wirth further agreed to furnish the above mentioned books, excepting "Hunolt Sermons" to Benziger Brothers at a discount of forty (40) per cent from the advertised sale price and said Benziger Brothers agreed to make payment to said Augustin Wirth of the moneys due him from the sale of his said books during the months of January, April, July, and October of each year and to treat said books as their own publications and put them in their catalogue of publications; that said Wirth delivered to said Benziger Brothers his stock of said copyrighted books prior to July 23rd, 1897, and that immediately thereafter the parties entered upon the performance of the said contract, as above set forth, and between July 23, 1897 and December 19, 1901, the date of the death of said Wirth, said Benziger Brothers sold said copyrighted books and publications, and during the months of January, April, July and October, of the years 1898, 1899 and 1900, and during the months of January, April and July of the year 1901, duly accounted in accordance with the terms of said contract for all sales of said copyrighted books made by them during the preceding three months, and for the cost of paper, printing and binding disbursed by them under said contract and during each of said months aforesaid paid to said Augustin Wirth the several amounts then found to be due on discount of such sales, and that on the 19th day of December, 1901, there was due, on account of sales made under said contract during the months of October, November and December of said year, the sum of $175.40,
48 which said sum said Benziger Brothers on January 25, 1902, paid to the complainant, the Order of St. Benedict of New

Jersey; that after the death of said Augustin Wirth, said Benziger Brothers continued to sell and are still selling under and by virtue of said contract said copyrighted books of said Wirth and that the proceeds of said sale amount to the specific sums enumerated and set forth in the Seventh Paragraph of the complainant's said original bill and that said sums accrued by virtue of said contract; that said Augustin Wirth was a Catholic Priest, a member of the corporation known as the Order of St. Benedict of New Jersey, the complainant herein; that said Wirth at the date of his death was about seventy-six years of age and that the Order of St. Benedict was established about the fifth century; that the purpose of the members was to live in community, apart from the world, in monastic life; to devote themselves to charitable and educational purposes; that to become a member of said Order it was necessary, at the time of making profession, to take what were described as the vows of chastity, poverty and obedience, and that the significance of the vow of poverty was the giving up of all right of possessing temporal goods, and the transfer of all property to the "Community" of members, and the taking of the vow was always accompanied by an actual transfer by the member to the society of all temporal goods which he then possessed, and by an agreement that he should henceforth assign to it whatever he might acquire; that at the organization of said Order, the founder thereof, formulated in Latin a rule known as "The Rule of St. Benedict," which in terms regulated the government of the Order and attached to said original bill of complaint made a part thereof and marked Exhibit "B," is a copy, translated into English of one Chapter of said Rule; that under the original rule formulated by St. Benedict the Community, composed of the members of said Order, could hold and acquire real estate, and later could acquire personal property, such ownership and possession being an ownership and possession in common for the uses and objects of the Order; that the significance of the vow of obedience was to deprive the member of his individual liberty as regards temporal things, and to subject him to the absolute control, as to his movements, of the monastic authority of the Order; that this immediate superior was the Abbot of the Abbey; that often a member was sent into a new field or work in which cases he transferred his vows to the Abbey to which he went; that wherever his work might be he was required to account for all moneys received by him and to pay the same to his Abbot; that in special cases, with his Abbot's consent, he might himself dispense the money for the benefit of the "Community" and for the
49 objects of his Order; that such consent was always revocable; that upon a person becoming a member of the Order of St. Benedict, and taking the vows mentioned, the Order agreed on its part to maintain and support the member for life, in sickness and in health, and in case of a transfer the new Abbey assumed the agreement of maintenance; that the first Order in the United States was established about 1846 and was known as the Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania; that said Wirth came to the United States prior to 1852 and made the above

described vows at St. Vincent's of Westmoreland County, Pennsylvania; a translation of the original vow which he made at St. Vincent's, and which is in the Latin Language, being annexed to and made a part of said original bill of complaint and marked Exhibit "C"; that a copy of the Act of Incorporation of the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, and of its By-Laws, are annexed to and made a part of said original bill of complaint and are marked, respectively, Exhibits D-1 and D-2; that subsequently in 1865 said Wirth was sent as a Prior by the Order of St. Benedict of Westmoreland County, Pennsylvania, to Atchison, Kansas, to take charge of and conduct there St. Benedict's Monastery, St. Benedict's College and St. Benedict's Church, and his work was continued there until the month of May 1887, and that in May 1887 he transferred his vows to St. Mary's Abbey of Newark, New Jersey, and that annexed to and made a part of said original bill of complaint, and marked Exhibit "E" is a copy of said transfer; and the effect of said transfer according to the Canon Law of the Society, and according to the Community agreement of the members, and as understood and intended by the parties, was to vest in the Abbey of St. Mary's of Newark, N. J., all the rights that the original Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania, had in the property of said Wirth and in all property he might thereafter acquire; that St. Mary's Abbey is incorporated in the State of New Jersey under the corporate name and style of "The Order of St. Benedict of New Jersey" and the following is a portion of Section 12 of the Constitution of said Order:

"Since the Order of St. Vincent of New Jersey is solely a charitable institution, the real estate of said Order, and the individual earnings of its members are, and must be, considered as common property of the Order of St. Benedict of New Jersey, from which the members of said Order derive their support, and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

Moreover, that each member individually pledges himself to have all the property which he now holds or thereafter may hold in his own name, conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey.

That said original bill of complaint further alleges, in substance, that a copy of the Act of Incorporation of said Order, and of its Constitution and By-Laws is attached to and made a part of said original bill and marked Exhibits "D" "E," "F-1" and "F-2," respectively; that from May 1887 down to the time of his death, December 19th, 1901, Augustin Wirth remained a member of St. Mary's Abbey and the Order of St. Benedict of New Jersey, and during all of said time received his maintenance and support from said Society and Order; at times and in some cases covering long periods,

he was sick and was nursed and cared for by the members of said Order; that before the publication and sale of his books by Benziger Brothers he was assisted by the members of the Order in the publication, sale and delivery of said books; by special permission of his Abbot he was, at times relieved of his educational charitable and religious work that the publication and sale of his books might be conducted with greater profit to the Order; that the reasonable and actual value of the said maintenance, nursing and care of said Wirth, and the said assistance given him in connection with the publication and sale of his books, far exceeded the value of the copyrights of said books and all profits from the sale of the same prior to the commencement of this action and all profits that will hereafter accrue; that during a part of the period mentioned said Wirth, by permission of his Abbot in Newark, New Jersey, was permitted to build a church and take care of a congregation in Springfield, Minnesota, beginning his work in August, 1898; that from May 1887 to August 1898 said Wirth's religious and charitable work was done in New Jersey and that he was continuing his work in Springfield, Minnesota, when he died; that said Wirth during his life time, accounted for moneys received by him in his work, including the money paid to him by Benziger Brothers pursuant to said contract, except at such times when for reasons an accounting was waived by said Order; that said Wirth was in receipt of considerable
51 money from various sources connected with his educational charitable and religious work, and from the sale of his books, which, at times, with the special permission of his superior, he held and disposed of for the benefit of the Community and for educational and religious purposes; that this permission was in force at the time, or part of the time, of the payments of moneys to him by said Benziger Brothers; that on or about the 20th day of June, 1899, said permission was revoked by the Abbot of New Jersey, and the Abbot Private of Rome, and from that time said Augustin Wirth was required to account to the Abbot of New Jersey for all moneys received by him; that there was at the date of the filing of said original bill in the hands of Albert Steinhauser, individually, or as Administrator of the Estate of Augustin Wirth, deceased, the sum of $1,524.65 in money and the proceeds of certain notes and mortgages which were foreclosed by said Albert Steinhauser as such Administrator and the record title to which is now in said Steinhauser as such Administrator, and certain other property of the value of about $896.85, a list of which if attached to and made a part of said original bill and marked Exhibit "F-3," which was not turned over to the complainant herein during the lifetime of said Wirth; and that all said property is the result of labor performed by said Wirth, while he was a member of said Order, and while the alleged contract between him and the complainant in the original bill was in full force and effect, and in equity and good conscience belongs to said complainant in said original bill; that the Order of St. Benedict and its members performed their contract at all times to maintain said Wirth and that said Wirth did not in his lifetime, transfer or assign to the Order of St. Benedict said property and was prevented

by his death from so assigning, transferring and conveying the said property in said original bill mentioned and said copyrights and that in equity and law the Order of St. Benedict is entitled to said moneys, notes, mortgages, property and copyrights, and all benefits and moneys arising from said copyrights; that said Wirth left no debts [of] unsatisfied demnads against his estate at the time of his death; that he left him surviving a brother and certain nieces and nephews residing in the State of Minnesota, as his only next of kin, and that said complainant has not received a greater amount of income or principal of personal or real estate than is permitted it by the laws of the State of New Jersey, and that this will be so even though the Court award judgment as in said original bill prayed for; that equitable title to the moneys, notes, mortgages and other property, and copyrights, mentioned in said original bill of complaint is in the Order of St. Benedict of New Jersey, and that payments herein alleged to have been made by Benziger Brothers
52 to said Order were valid payments; that on the 17th day of October, 1906, an action at law was commenced in the United States Circuit Court for the Southern District of New York by Albert Steinhauser as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, against said Benziger Brothers, the object of said suit being to recover from them the amount in said original bill of complaint herein alleged to have been paid to the complainant; that as the facts stated in the original bill of complaint in this action could not be set up, as a defense in said law action brought by said Steinhauser, for the reason that the same constitutes an equitable defense which could not be pleaded in an action at law, said Benziger Brothers, on the 15th day of December, 1906, brought an action in the same Court and same District, on the equity side of the Court, against said Steinhauser, administrator, to enjoin the prosecution of said law action and to adjudge that the equitable title to the copyrights mentioned *were* in the complainant in said original bill, and that the payments made by said Benziger Brothers to said complainant herein, were valid payments and that said law action is still pending.

That the prayer of said original bill of the complainant herein is, in substance, that the Court adjudge that the equitable title to the moneys, notes and mortgages and other property, and copyrights, mentioned in said original bill is in the Order of St. Benedict of New Jersey, and that it adjudge further that the payments made by said Benziger Brothers to the Order of St. Benedict of *St. Benedict of* New Jersey were valid payments and that such Order was entitled to the moneys so paid and not Steinhauser as Administrator of the Estate of said Augustin Wirth, deceased; that the Court grant an order directing said Steinhauser as Administrator to pay over and transfer the moneys, notes, mortgages and other property in said original bill mentioned, to the complainant therein and also to assign said copyrights; and that said complainant have such other and further relief as the Court may deem proper.

Thrid. This defendant respectfully shows unto your Honors that subsequent to the filing of said original bill of complaint and upon

or about the — day of September, 1907, service of a chancery subpœna in said suit was duly made upon this defendant; that the time for this defendant to answer was duly extended until the — day of February, 1909, rule day of this Court that upon, or before said rule day this defendant file his answer herein and upon the — day of ——, 1909, this defendant file his petition for leave to file a cross bill herein and on or about the — day of ——, 1909, an order was entered herein permitting this defendant Albert Steinhauser
53 as Administrator as aforesaid, to file a cross bill herein at any time up to the — day of ——, 1909, rule day of this Court.

And this defendant, and cross-complainant, further shows unto your Honors:

Fourth. That said Augustin Wirth died intestate December 22, 1901, in the County of Brown, State of Minnesota, as in said Original bill set out and that said Augustin Wirth was at the date of his death, and had been for many years prior thereto, a resident of said County and State, and owned, held, and possessed property therein, belonging to himself, other than the property set out, mentioned and described in said Original bill of complainant, including, among other properties and possessions, valuable books, papers, documents and manuscripts, complete and incomplete, written, translated and prepared by said Augustin Wirth for publication and sale; copyrights and documentary evidence of such copyrights, upon the literary works of said August Wirth mentioned in and set out in said Original bill, and also, upon other literary works of said Augustin Wirth and other moneys, notes, mortgages, securities, accounts and evidence of indebtedness and divers and various other book, papers, documents, and property aggregating in value many thousand dollars and exceeding the sum and value of Two thousand (2,000) dollars exclusive of interest and costs.

Fifth. That at the time and upon the death of said Augustin Wirth, as aforesaid, the said complainant, in said Original Bill, and its officers, agents and servants, acting under its express direction, but without authority of law took into the exclusive possession of said complainant in said Original Bill, all of said books, papers, manuscripts, documents, moneys, notes, mortgages, securities, copyrights, documentary evidence of copyrights, and papers, and, in fact, all of the goods, chattels, property and effects of said Augustin Wirth, except those specifically charged in said Original Bill to have come into the possession of this defendant and cross-complainant, as administrator, and removed the same from the jurisdiction of the Courts of the State of Minnesota and especially from the jurisdiction of the Probate Court of Brown County in said State, and concealed the same from the heirs at law of said Augustin Wirth, deceased, and from the administrator of, and persons interested in, the estae of said decedent, and thereafter, the said complainant in said Original Bill collected, used, appropriated and unlawfully converted and disposed of, said moneys, property, goods, chattels and effects of said decedent, to its own exclusive use and benefit, and still has,
54 holds and converts the same, wrongfully and without authority of law, and the interest, profits and accumulations thereof

and the proceeds arising from the sale and disposition thereof made by said complainant in said Original Bill.

That in particular, this defendant and cross-complainant shows, upon information and belief, that among said effects were certain manuscripts prepared, translated and written by said Augustin Wirth, for publication and sale in book form, and owned by him ready for publication and sale, at the time of his death, worth, and salable for, a large sum of money, which said complainant in said Original Bill, its officers, agents and servants acting by and under its direction took, appropriated and converted the same or disposed of and now has the proceeds thereof.

This defendant and cross-complainant further shows unto your Honors, also from information and belief, that the said property so taken, either from the immediate personal effects of said Augustin Wirth or from his agents or representative holding the same in trust for him, included, also, certain promissory notes and securities thereafter due or to become due or payable, to said August Wirth, as follows, to-wit:

Three (3) promissory notes aggregating One thousand three hundred (1,300) Dollars, two thereof for $500 each and one thereof for $300, all made and executed by Alfred McCahill, with interest to accrue upon each at the rate of seven (7) per cent per annum from date, a date unknown to your Orator and which he has heretofore had no means of ascertaining.

Three promissory notes aggregating One thousand three hundred (1,300) Dollars, two thereof for $500 each and one thereof for $300, all made and executed by Theodore Keogh, with interest to accrue upon each at the rate of seven (7) per cent per annum from date, a date unknown to your Orator and which he has heretofore had no means of ascertaining.

One certain promissory note, or bond, made, executed and delivered by a corporation, or institution known as St. Rafael's School, of Springfield, Minnesota, the exact corporate name or title of said St. Rafael's School being unknown to your Orator, in the sum of Three thousand five hundred (3,500) secured by one certain mortgage upon property of said School at Springfield, Minnesota, with interest to accrue thereon at a rate and from a date unknown to your Orator.

Also certain promissory notes made by or formerly in the possession of one Casper Ernst, upon which payments of interest, and principal, were made to, or collected by, the said complainant herein, or its agent, or agents, and delivered to and paid over to the
55 complainant herein, in an aggregate amount unknown to your orator, but as he is informed and believes and therefore charges the fact to be, in excess of the sum of $3,000.

That said moneys, notes, bonds and property, and all interest, accumulations and profits thereof, had been received by and appropriated to the use of, the said complainant, and the same is still wrongfully held and retained by the said complainant. That a more complete or accurate list or schedule of said property, assets and effects of said Augustin Wirth, deceased, so wrongfully taken and con-

verted and retained by said complainant, cannot be made or given by your orator.

Sixth. That the said Augustin Wirth was, at the time of his death, unmarried, and left him surviving neither issue nor father, nor mother, and his next of kin, and heirs of law were, at the time of his death, Valentine Wirth, a brother, who resided at Nebraska City, Nebraska, now deceased, his sole legatees being the following persons, Regina Weigand, the only child of a deceased sister who resides at Nebraska City, Nebraska; Florian Wirth, the only child of a deceased brother of said Augustin Wirth, who resides at Elizabeth, New Jersey.

That all of said next of kin were at the time of the death of said Augustin Wirth, and Regina Weigand and Florian Wirth still are non-residents of the State of Minnesota and, as your Orator is informed and believes, were not informed by, nor did they acquire any knowledge from the said complainant of the details of the property of said Augusuin Wirth or that he possessed property in any considerable amount; but that the particulars of such property and of its disposition, were concealed from them by said complainant; that no administration was granted upon the Estate of said Augustin Wirth, deceased, until about the 16th day of March, 1904, at which time the letters of administration were issued to your Orator in proceedings in said Probate Court of Brown County instituted by and under the authority and direction of the said complainant herein; that notwithstanding diligent inquiry has been made by your Orator of all persons, and in all places, and of the complainant, and of its officers and agents, concerning the property and assets of the said Augustin Wirth, deceased, your Orator has only but recently, and since the commencement of this action in equity, learned the full facts, as herein set forth, concerning the various properties, except those mentioned in the Original Bill, that the said complainant had taken and converted to its own use the said notes made and
56 executed by the said Alfred McCahill, the said Theodore Keogh, the said Casper Ernst, the said St. Rafael's School, and others, or that the complainant had, in fact, taken, converted and received to its use and possession all of the manuscripts, documents, books, papers, securities and effects of said Augustin Wirth, deceased.

Seventh. Your Orator further shows unto the court that said complainant wrongfully holds and retains all of said property and effects, or have wrongfully disposed of the same, or some part thereof under claim of some equitable right thereto, claiming to be the equitable owner thereof by reason of an alleged contract, agreement or understanding, with the said Augustin Wirth, deceased, fully set out, and in issue, in the complainant's Original bill of complaint filed herein, and under which it is claimed that neither your Orator as administrator as aforesaid, nor the heirs at law of Augustin Wirth deceased, nor any person, for or in their behalf, have any legal right, title or claim whatsoever to said property, and the said complainant refuses to account therefore, or to deliver said property, or any part thereof, to your Orator as such Administrator.

Eighth. This defendant, and cross-complainant avers that all the

said actings, takings and pretenses of the complainant in this action, in the premises, are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of this defendant and cross-complainant, as Administrator of the Estate of said Augustin Wirth, deceased.

In Consideration Wherefore, and in as much as this defendant and cross-complainant is remediless in the premises at and by the strict rules of common law, and can only have relief in a court of equity, where matters of this sort are properly cognizable and relievable and to the end, therefore, that the said complainant herein may, if it can, show why this defendant and cross-complainant should not have the relief hereby prayed for, and the said complainant herein be required, according to the utmost and best of its knowledge, remembrance, information and belief, respectively, to make full, true, direct and perfect answer (but not under oath, an answer under oath being hereby expressly waived,) to all and singular the matters and things hereinbefore set forth and alleged as fully and particularly as if the same were here repeated. And that all matters issueable herein, and depending upon the determination of this Honorable Court of the sufficiency, validity, or equity, of the claim set forth by the said complainant in its Original Bill of complaint, of the right to the aforesaid mentioned property, may be adjudicated and de-
57 termined in this action and multiplicity of suits be thereby avoided, prays this Honorable Court to grant unto your Orator, this defendant and cross-complainant, a writ of subpœna directed to the said the Order of St. Benedict of New Jersey requiring commanding it to appear herein and answer (not under oath, an answer under oath being hereby waived) to the several allegations in this cross-complaint contained. That the said complainant be required to discover, and set forth, a true and particular account, of all and singular the personal estate, and effects of the said Augustin Wirth, deceased, and of every part thereof, excepting always and only such property as is described, mentioned and set out in the complainants' Original Bill of complaint herein, and the several Schedules and exhibits thereunto attached, which has been possessed by, or come to, the hands of said complainant, or to the hands, of any other person, or persons, by its order, or for its use, or its benefit; with the particular nature, qualities, quantities and true and utmost values thereof, and of every part thereof, respectively, and how same and every part thereof, has been applied or disposed of; and whether any and what part of such personal estate remains outstanding to any and what amount and why; and that it be required to set forth any and every adverse interest, claim or demand which it may have, claim or make to the said property, or any part thereof, other than as set out in its said Original Bill of complaint herein, to the end that such adverse interest, claim or demand, may be justly adjudicated and declared null and void as against this defendant and cross-complainant.

And that the said complainant herein, in said Original Bill, may set forth a list, or schedule, and description, of every deed, book, book of account, letter, paper, or writing, relating to the

matters and properties aforesaid, or to any of them, or wherein or whereupon there is any note, memorandum or writing, relating in any manner thereto, which now are, or ever were, in its possession or power, and may particularly describe which thereof now are in its possession or power; and that said complainant in said Original Bill may account for such as are not in its power or possession and such that it has wrongfully confiscated and converted.

And that said complainant in said Original Bill make a full and true discovery and disclosure of, and concerning, all and singular the transactions and matters aforesaid, and that an account may be taken, by and under the direction and decree of this Honorable Court, of all of the moneys, books, papers, notes, documents, bonds mortgages, securities, and effects, of the said Augustin Wirth,
58 deceased, which have come into said complainant's hands, or possession, or into the hands or possession of any other person or persons for it.

And that all of the claim or claims, of title, right, and ownership, of the said complainant in said Original Bill in and to any and all of said property and effects, be adjudged to be void and of no effect as against this defendant and cross-complainant; that the title and ownership and right of possession of this defendant and cross-complainant therein and thereto, and to all thereof be established and confirmed as against the claims of the said defendant in said Original Bill thereto, and that this defendant and cross-complainant have and recover from said complainant, in said Original Bill all and every part thereof.

And may it please your Honors to grant unto this defendant and cross-complainant a writ of subpœna in Chancery, directed to the order of St. Benedict of New Jersey, as defendant in this Cross-Bill, commanding it to appear before your Honors, in said District, and answer this Cross-Bill, and to abide by and perform such orders and decrees in the premises, as to your Honors may seem proper, and required by the principles of equity and good conscience, and finally, that this defendant and cross-complainant, have such other and further relief, preliminary and final, as to the Court may seem meet and proper, and which equity may require, and for costs of suit.

ALBERT STEINHAUSER,
As Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant and Cross-complainant.

CHARLES L. BURR AND
PITZER & HAYWARD,
Solicitors for Defendant and Cross-complainant.

STATE OF MINNESOTA,
County of Brown, ss:

I, Albert Steinhauser, do solemnly affirm: That I am the administrator of the goods, chattels and credits of Augustin Wirth,

deceased, and the defendant in the first above entitled action, and the cross-petitioner in said action. That I have read the foregoing cross-bill and know the contents thereof, and that the matters of fact therein stated are true, except as the matters therein stated upon information and belief; and as to those matters I believe them to be true.

ALBERT STEINHAUSER.

59 Subscribed in my presence and affirmed before me this 25th day of October, A. D. 1909.

[NOTARIAL SEAL.] HENRY D. LANG,
Notary Public, Ramsey County, Minnesota.

My commission expires April 24th, 1913.

Endorsed: Cross-bill. Filed Oct. 27, 1909. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

Original Bill.

ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Complainant,
against
THE ORDER OF ST. BENEDICT OF NEW JERSEY, Defendant.

Cross-bill.

Answer of the Order of St. Benedict of New Jersey to the Cross-bill of Complaint of Albert Steinhauser, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased.

The defendant now and at all times hereinafter saving unto itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said cross bill of complaint contained and for answer thereto or so much thereof as this defendant is advised it is necessary or material to make answer to, answering says:

First. The defendant admits the allegations contained in the first paragraph of said cross bill: "That he, the said Albert Steinhauser, is the Administrator of the goods, chattels and credits and of the estate of Augustin Wirth, deceased, under authority of Letters of Administration issued to him by the judgment and order of the Probate Court of Brown County, State of Minnesota, on the 16th

day of March, 1904, that he is now, and at all times since the filing of said original bill of complaint was a resident of the town of New Ulm, in the said County of Brown, State of Minnesota, and is, and during all of said time was, a citizen of said State of Minnesota".

Second. That defendant admits the allegations alleged in the second paragraph of said cross bill that "The Order of St. Benedict of New Jersey, filed in this Honorable Court its original bill
60 in Equity against this defendant on or about the — day of September, 1907, alleging, among other things, in substance, that the Order of St. Benedict of New Jersey is a corporation duly organized and existing under the Laws of the State of New Jersey and having its principal place of business in the City of Newark, County of Essex and State of New Jersey; that Albert Steinhauser, of the Village of New Ulm, in the County of Brown, State of Minnesota, is a citizen of said State, and administrator of the goods, chattels and credits of Augustin Wirth, deceased; that the amount in controversy exceeds the sum in value of Two thousand ($2,000) Dollars, exclusive of interest and costs; that on or about the 19th day of December, 1901, Augustin Wirth died intestate in the County of Brown, State of Minnesota; that the 16th day of March, 1904, Letters of Administration of the Goods, Chattels and Credits of said Augustin Wirth, deceased, were granted and issued to Albert Steinhauser, pursuant to decree made and entered by the Judge of the Probate Court of said County of Brown, the said decree being made upon certain papers in which, among other things, it was averred that Augustin Wirth was a resident at the time of his death of the said County of Brown and left personal property in said County and in said State of Minnesota; that said Augustin Wirth was the author of the following books:

"Hunolt Sermons"
"New May Devotions"
"The Confessional"
"Eight Short Practical Sermons on Mixed Marriages"
"New & Old Sermons"
"The Seven Last words on the Cross"
"Two Retreats for Sisters"
"Thoughts & Counsels for the Consideration of Young Men"
"Lenten Sermons"
"Funeral Sermons"
"The Two Edge-Sword"
"The Sacrament of Penance"

and had prior to the 23rd day of July, 1897, duly copyrighted each of said books under and in accordance with the then existing copyright law of the United States by complying in all respects with the conditions and requirements of said law, whereby there was secured to said Augustin Wirth, and his assigns, during his lifetime, and to his executors, administrators or assigns, upon his death, for the term of twenty-eight years from the date of the copyright of each of said books respectively, the full and exclusive right of printing, publishing and vending said books aforesaid throughout the United

States, and that during said period aforesaid, and from time
61 to time, Louis G. Benziger and Nicholas C. Benziger, publishers, doing business in the City of New York, State of New York under the firm name of Benziger Brothers, in the usual course of their business of buying and selling books, bought of said Augustin Wirth for resale, and sold, many of his said copyrighted books; that on or about June 23, 1897, said Benziger Brothers entered into a written contract and agreement with said Augustin Wirth, a copy whereof is annexed to and made a part of complainant's said original bill of complaint and marked Exhibit "A", wherein and whereby said parties agreed among other things as follows: Said Augustin Wirth agreed to give to said Benziger Brothers the exclusive sale of "Hunolt Sermons" for the term of ten years and to deliver to them his complete stock of said books then on hand; that Benziger Brothers agreed to print and bind said books when they had to be reprinted, the charge for paper, printing and binding to be paid by said Augustin Wirth at the cost price; said Augustin Wirth agreed to furnish said "Hunolt Sermons" to Benziger Brothers at fifty (50) per cent discount from the advertised price; at the expiration of ten years from the date of said agreement the plates of the five volumes of said "Hunolt Sermons" were to become the property of Benziger Brothers, with the right to publish the work without paying any royalty thereon, together with the stock then on hand; said Benziger Brothers reserving the right to buy at cost price all paper, printing and binding of the same; said Augustin Wirth further agreed to give to said Benziger brothers for the term of three years, and thereafter until six months' notice was given by either party of the termination of the contract, the exclusive sale of his other said books hereinbefore enumerated, said Wirth agreeing, also, to deliver to Benziger Brothers, not later than three months from the date of said agreement, the complete stock he then had on hand of said last above mentioned books and that when said books had to be reprinted, Benziger Brothers agreed to have said reprinting and binding done, charging the printing and binding to said Augustin Wirth at the cost price; said Augustin Wirth further agreed to furnish the above mentioned books, excepting "Hunolt Sermons" to Benziger Brothers at a discount of forty (40) per cent from the advertised sale price and said Benziger Brothers agreed to make payment to said Augustin Wirth of the moneys due him from the sale of his said books during the months of January, April, July and October of each year and to treat said books as their own publications and put them in their catalogue of publications; that said Wirth delivered to said Benziger Brothers his stock of said copyrighted books prior to July 23, 1897, and that immediately thereafter the parties entered upon the performance of the said contract, as above set forth, and between
62 July 23, 1897 and December 19, 1901, the date of the death of said Wirth, said Benziger Brothers sold said copyrighted books and publications and during the months of January, April, July and October of the year 1898, 1899 and *1899 and* 1900, and during the month of January, April and July of the year 1901, duly accounted in accordance with the terms of said contract for all sales of

said copyrighted books made by them during the preceding three months, and for the cost of paper, printing and binding disbursed by them under said contract and during each of said months after said [—] paid to said Augustin Wirth the several amounts then found to be due on account of such sales, and that on the 19th day of December, 1901, there was due, on account of sales made under said contract during the months of October, November and December of said year, the sum of $175.40, which said sum said Benziger Brothers on January 25, 1902, paid to the complainant, the Order of St. Benedict of New Jersey; that after the death of said Augustin Wirth, said Benziger Brothers continued to sell and are still selling under and by virtue of said contract said copyrighted books of said Wirth and that the proceeds of said sale amount to the specific sums enumerated and set forth in the Seventh Paragraph of the complainant's said original bill and that said sums accrued by virtue of said contract; that said Augustin Wirth was a Catholic Priest, a member of the corporation known as the Order of St. Benedict of New Jersey, the complainant herein; that said Wirth at the date of his death was about seventy-six years of age and that the Order of St. Benedict was established about the fifth century; that the purpose of the members was to live in community, apart from the world, in monastic life; to devote themselves to charitable and educational purposes; that to become a member of said Order it was necessary, at the time of making profession, to take what were described as the vows of chastity, poverty and obedience, and that the significance of the vow of poverty was the giving up of all right of possessing temporal goods, and the transfer of all property to the "community" of members, and the taking of the vow was always accompanied by an actual transfer by the members of the society of all temporal goods which he then possessed, and by an agreement that he should henceforth assign to it whatever he might acquire; that at the organization of said Order, the founder thereof, formulated in Latin a rule known as "The Rule of St. Benedict", which in terms regulated the government of the Order and attached to said original bill of complaint made a part thereof and marked Exhibit "B" is a copy, translated into English of one Chapter of said
63 Rule; that under the original rule formulated by St. Benedict the Community, composed of the members of said Order, could hold and acquire real estate, and later could acquire personal property, such ownership and possession being an ownership and possession in common for the uses and objects of the Order; that the significance of the vow of obedience was to deprive the member of his individual liberty as regards temporal things, and to subject him to the absolute control, as to his movements, of the monastic authority of the Order; that his immediate superior was the Abbot of the Abbey; that often a member was sent into a new field of work in which case he transferred his vows to the Abbey to which he went; that wherever his work might be he was required to account for all moneys received by him and to pay the same to his Abbot; that in special cases with his Abbot's consent, he might himself dispense the money for the benefit of the "Community" and for the objects of his Order; that such consent was always

revocable; that upon a person becoming a member of the Order of St. Benedict, and taking the vows mentioned, the Order agreed on its part to maintain and support the member for life, in sickness and in health, and in case of a transfer the new Abbey assumed the agreement of maintenance; that the first Order in the United States was established about [1864] and was known as the Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania; that said Wirth came to the United States prior to 1852 and made the above described vows at St. Vincent's of Westmoreland County, Pennsylvania; a translation of the original vow which he made at St. Vincent's, and which is in the Latin Language, being annexed to and made a part of said original bill of complaint and marked Exhibit "C"; that a copy of the Act of Incorporation of the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, and of its By-Laws, are annexed to and made a part of said original bill of complaint and are marked, respectively, Exhibits D-1 and D-2; that subsequently in 1865 said Wirth was sent as a Prior by the Order of St. Benedict of Westmoreland County, Pennsylvania, to Atchison, Kansas, to take charge of and conduct there St. Benedict's Monastery, St. Benedict's College and St. Benedict's Church, and his work was continued there until the month of May 1887, and that in May 1887 he transferred his vows to St. Mary's Abbey of Newark, New Jersey, and that annexed to and made a part of said original bill of complaint, and marked Exhibit "E" is a copy of said transfer; and the effect of said transfer according to the Canon Law of the Society, and according to the Community agreement of the members, and as understood and intended by the parties, was to vest in the Abbey of St.
64 Mary's of Newark, N. J., all the rights that the original Benedictine Society of St. Vincent's Westmoreland County, Pennsylvania and in the property of said Wirth and in all property he might thereafter acquire; that St. Mary's Abbey is incorporated in the State of New Jersey under the corporate name and style of "The Order of St. Benedict of New Jersey" and the following is a portion of Section 12 of the Constitution of said Order:"

"Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order, and the individual earnings of its members are, and must be, considered as common property of the Order of St. Benedict of New Jersey, from which the members of said Order derive their support, and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

"Moreover, that each member individually pledges himself to have all the property which he now holds or hereafter may hold in his own name, conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

"That said original bill of complaint further alleges, in substance, that a copy of the Act of Incorporation of said Order, and of its Constitution and By-Laws is attached to and made a part of said original bill and marked Exhibits "D", "E", "F-1" and "F-2", respectively; that from May 1887 down to the time of his death, December 19th 1901, Augustin Wirth remained a member of St. Mary's Abbey and the Order of St. Benedict of New Jersey, and during all of said time received his maintenance and support from said Society and Order; at time- and in some cases covering long periods, he was sick and was nursed and cared for by the members of said Order; that before the publication and sale of his books by Benziger Brothers he was assisted by the members of the Order in the publication, sale and delivery of said books; by special permission of his Abbot he was, at times relieved of his educational charitable and religious work that the publication and sale of his books might be conducted with greater profit to the Order; that the reasonable and actual value of the said maintenance, nursing and care of said Wirth, and the said assistance given him in connection with the publication and
65 sale of his books, far exceeded the value of the copyrights of said books and all profits from the sale of the same prior to the commencement of this action and all profits that will hereafter accrue; that during a part of the period mentioned said Wirth, by permission of his Abbot in Newark, New Jersey, was permitted to build a church and take care of a congregation in Springfield, Minnesota, beginning his work in August, 1898; that from May 1887 to August 1898, said Wirth's religious and charitable work was done in New Jersey and that he was continuing his work in Springfield, Minnesota, when he died; that said Wirth during his lifetime, accounted for moneys received by him in his work, including the money paid to him by Benziger Brothers pursuant to said contract, except at such times when for reasons an accounting was waived by said Order; that said Wirth was in receipt of considerable money from various sources connected with his educational charitable and religious work, and from the sale of his books, which at times, with the special permission of his superiors, he held and disposed of for the benefit of the Community and for educational and religious purposes; that this permission was in force at the time, or part of the time, of the payments of moneys to him by said Benziger Brothers; that on or about the 20th day of June, 1899, said permission was revoked by the Abbot of New Jersey, and the Abbot Private of Rome, and from that time said Augustin Wirth was required to account to the Abbot of New Jersey for all moneys received by him; that there was at the date of the filing of said original bill in the hands of Albert Steinhauser, individually or as Administrator of the Estate of Augustin Wirth, deceased, the sum of $1,524.65 in money and the proceeds of certain notes and mortgages which were foreclosed by said Albert Steinhauser as such Administrator and the record title to which is now in said Steinhauser as such Administrator, and certain other property of the value of about $896.85, a list of which is attached to and made a part of said original bill and marked Exhibit "F-3", which was not turned over to the complainant herein during the

lifetime of said Wirth; and that all said property is the result of labor performed by said Wirth, while he was a member of said Order, and while the alleged contract between him and the complainant in the original bill was in full force and effect, and in equity and good conscience belongs to said complainant in said original bill; that the Order of St. Benedict and its members performed their contract at all times to maintain said Wirth and that said Wirth did not, in his lifetime, transfer or assign to the Order of St. Benedict said
66 property and was prevented by his death from so assigning, transferring and conveying the said property in said original bill mentioned and said copyrights and that in equity and law the Order of St. Benedict is entitled to said moneys, notes, mortgages, property and copyrights, and all benefits and moneys arising from said copyrights; that said Wirth left no debts of unsatisfied demands against his estate at the time of his death; that he left him surviving a brother and certain nieces and nephews residing in the State of Minnesota, as his only next of kin, and that said complainant has not received a greater amount of income or principal of personal or real estate than is permitted it by the laws of the State of New Jersey, and that this will be so even though the Court award judgment as in said original bill prayed for; that equitable title to the moneys, notes, mortgages and other property, and copyrights, mentioned in said original bill of complaint is in the Order of St. Benedict of New Jersey, and that payments therein alleged to have been made by Benziger Brothers to said Order were valid payments; that on the 17th day of October, 1906, an action at law was commenced in the United States Circuit Court for the Southern District of New York by Albert Steinhauser as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, against said Benziger Brothers, the object of said suit being to recover from them the amount in said original bill of complaint herein alleged to have been paid to the complainant; that as the facts stated in the original bill of complaint in this action could not be set up, as a defense in said law action brought by said Steinhauser, for the reason that the same constituted an equitable defense which could not be pleaded in an action at law, said Benziger Brothers, on the 15th day of December, 1906, brought an action in the same Court and same District, on the equity side of the Court, against said Steinhauser, administrator, to enjoin the prosecution of said law action and to adjudge that the equitable title to the copyrights mentioned were in the complainant in said original bill, and that the payments made by said Benziger Brothers to said complainant herein, were valid payments and that said law action is still pending."

"That the prayer of said original bill of the complainant herein is, in substance, that the Court adjudge that the equitable title to the moneys, notes and mortgages and other property, and copyrights, mentioned in said original bill is in the Order of St. Benedict of New Jersey, and that it adjudge further that the payments made by said Benziger Brothers to the Order of St. Benedict of New Jersey were valid payments and that such Order was entitled to the moneys so

paid and not Steinhauser as Administrator of the Estate of
67 said Augustin Wirth, deceased; that the Court grant an order directing said Steinhauser as Administrator to pay over and transfer the moneys, notes, mortgages and other property in said original bill mentioned, to the complainant therein and also to assign said copyrights; and that said complainant have such other and further relief as the Court may deem proper."

Third. The defendant admits the allegations alleged in the Third paragraph of said cross-bill: "That subsequent to the filing of said original bill of complaint and upon or about the — day of September, 1907, service of a chancery subpœna in said suit was duly made upon this defendant; that the time for this defendant to answer was duly extended until the — day of February, 1909, rule day of this Court; that upon, or before said rule day this defendant file his answer herein and upon the — day of —— 1909, this defendant file his petition for leave to file a cross-bill herein and on or about the — day of —— 1909, an order was entered herein permitting this defendant Albert Steinhauser as Administrator as aforesaid, to file a cross bill herein at any time up to the — day of —— 1909, rule day of this Court."

Fourth. This defendant admits the allegations contained in Paragraph Fourth of said cross-bill that said Augustin Wirth died intestate December 22, 1901, in the County of Brown, State of Minnesota.

Fifth. The defendant denies the allegations contained in paragraph fourth of said cross-bill: "That said Augustin Wirth was at the date of his death, and had been for many years prior thereto, a resident of said County and State, and owned, held, and possessed property therein, belonging to himself, other than the property set out, mentioned and described in said original bill of complaint, including, among other properties and possessions, valuable books, papers, documents and manuscripts, complete and incomplete, written, translated and prepared by said Augustin Wirth for publication and sale; copyrights and documentary evidence of such copyrights, upon the literary works of said Augustin Wirth mentioned in and set out in said original bill, and also, upon other literary works of said Augustin Wirth and other moneys, notes, mortgages, securities, accounts and evidences of indebtedness and divers and various other books, papers, documents and property aggregating in value many thousands of dollars and exceeding the sum and value of Two thousand (2,000) Dollars exclusive of interest and costs."

Sixth. The defendant denies the allegations contained in the Fifth paragraph of said cross bill: "That at the time and
68 upon the death of said Augustin Wirth, as aforesaid, the said complainant, in said original bill, and its officers, agents and servants, acting under its express direction, but without authority of law, took into the exclusive possession of said complainant in said Original bill, all of said books, papers, manuscripts, documents, moneys, notes, mortgages, securities, copyrights, documentary evidence of copyrights and papers, and, in fact, all of the goods, chattels, property and effects of said Augustin Wirth, and removed

the same from the jurisdiction of the Courts of the State of Minnesota and especially from the jurisdiction of the Probate Court of Brown County in said State, and concealed the same from the heirs at law of said Augustin Wirth, deceased, and from the administrator of, and persons interested in, the estate of said decedent, and thereafter, the said complainant in said Original Bill collected, used, appropriated and unlawfully converted and disposed of, said moneys, property, goods, chattels and effects of said decedent, to its own exclusive use and benefit, and still has, holds and converts the same, wrongfully, and without authority of law, and the interest, profits and accumulations thereof and the proceeds arising from the sale and disposition thereof made by said complainant in said Original Bill. That among said effects were certain manuscripts prepared, translated and written by said Augustin Wirth, for publication and sale in book form, and owned by him ready for publication and sale, at the time of his death, worth, and salable for, a large sum of money which said complainant in said Original Bill, its officers, agents and servants acting by and under its direction took, appropriated and converted the same or disposed of and now has the proceeds thereof. That the said property so taken, either from the immediate personal effects of said Augustin Wirth or from agents or representatives holding the same in trust for him, included, also, certain promissory notes and securities thereafter due or to become due and payable, to said Augustine Wirth, as follows, to-wit:

Three (3) promissory notes aggregating One thousand three hundred (1,300) Dollars, two thereof for $500. each and one thereof for $300., all made and executed by Alfred McCahill, with interest to accrue upon each at the rate of seven (7) per cent per annum from date, a date unknown to your Orator and which he has heretofore had no means of ascertaining.

Three promissory notes aggregating one thousand and three hundred (1,300) Dollars, two thereof for $500., each and one thereof for $300., all made and executed by Theodore Keogh, with interest to accrue upon each at the rate of Seven (7) per cent per annum from date, a date unknown to your Orator and which he has heretofore had no means of ascertaining.

69 One certain promissory note, or bond, made, executed and delivered by a corporation, or institution known as St. Rafael's School, of Springfield, Minnesota, the exact corporate name or title of said St. Rafael's School being unknown to your Orator, in the sum of Three thousand five hundred (3,500) dollars secured by one certain mortgage upon property of said School at Springfield, Minnesota, with interest to accrue thereon at a rate and from a date unknown to your Orator. Also certain promissory notes made by or formerly in the possession of one Casper Ernst, upon which payments of interest and principal, were made to, or collected by, the said complainant herein, or its agent, or agents, and delivered to and paid over to the complainant herein, in an aggregate amount unknown to your Orator, but, as he is informed and believes and therefore charges the fact to be, in excess of the sum of $3,000.

"That said moneys, notes, bonds, and property, and all interest,

accumulations and profits thereof, had been received by and appropriated to the use of, the said complainant, and the same is still wrongfully held and retained by the said complainant. That a more complete or accurate list or schedule of said property, assets and effects of said Augustin Wirth, deceased, so wrongfully taken and converted and retained by said complainant, cannot be made or given by your Orator.

Seventh. This defendant admits the allegation contained in the Sixth paragraph of said cross bill:

That the said Augustin Wirth, was, at the time of his death, unmarried, and left [*his*] surviving neither issue nor father, nor mother."

Eighth. Defendant does not know and cannot set forth as to its belief or otherwise, whether or not it is a fact that the next of kin and heirs at law of Augustin Wirth deceased, were, "at the time of his death, Valentine Wirth, a brother, who resides at Nebraska City, now deceased, his sole legatees being the following persons: Regina Weigand, the only child of a deceased sister, who resides at Nebraska City, Nebraska; Florian Wirth, the only child of a deceased brother of said Augustin Wirth, who resides at Elizabeth, New Jersey, that all of said next of kin were at the time of the death of said Augustin Wirth, Regina Weigand and Florian Wirth, and still are non residents of the State of Minnesota."

Ninth. The defendant denies the allegations contained in the Sixth paragraph of the complaint that the next of kin of Augustin Wirth "were not informed, by, nor did they acquire any knowledge from the said complainant of the details of the property of said Augustin Wirth or that he possessed property, in any con-
70 siderable amount; but that the particulars of such property, and of its disposition, were concealed from them by said complainant; that no administration was granted upon the estate of said Augustin Wirth, deceased, until about the 16th day of March, 1904, at which time the letters of administration were issued to your Orator, in proceedings in said Probate Court of Brown County instituted by and under the authority and direction of the said complainant herein; that notwithstanding diligent inquiry has been made by your Orator of all persons, and in all places, and of the complainant, and of its officers and agents, concerning the property and assets of the said Augustin Wirth, deceased, your Orator has only but recently, and since the commencement of this action in equity, learned the full facts, as herein set forth, concerning the various properties, except those mentioned in the original bill, that the said complainant had taken and converted to its own use the said notes made and executed by the said Alfred McCahill, the said Theodore Keogh, the said Casper Ernst, the said St. Rafael's School, and others, or that the complainant had, in fact, taken, converted and received to its use and possession, all of the manuscripts, documents, books, papers, securities and effects of said Augustin Wirth, deceased."

Tenth. This defendant denies the allegations contained in paragraph seventh of the cross bill: "That said complainant wrongfully

holds and retains all of said property and effects, or *have* wrongfully disposed of the same, or some part thereof under claim of some equitable right thereto, claiming to be the equitable owner thereof by reason of an alleged contract, agreement or understanding, with the said Augustin Wirth, deceased fully set out, and in issue, in the complainant's original bill of complaint filed herein, and under which it is claimed that neither your Orator as administrator as aforesaid, nor the heirs at law of Augustin Wirth, deceased, nor any person, for or in their behalf, have any legal right, title or claim whatsoever to said property, and the said complainant refuses to account therefore, or to deliver said property, or any part thereof, to your Orator as such Administrator."

Eleventh. The defendant denies the allegations contained in the eighth paragraph of said cross bill:—"that all the said acting, takings and pretenses of the complainant in this action, in the premises, are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of this defendant and cross-complainant, as administrator of the estate of said Augustin Wirth, deceased."

Twelfth. This defendant again avers the allegations and each of the allegations contained in the original bill filed in this
71 action, and prays that the same and the exhibits attached to said bill, be made a part hereof as though said allegations and each of the same and said exhibits were again herein set forth in full.

Thirteenth. The defendant in the Schedule hereto annexed marked "Exhibit A," and which the defendant prays may be taken as a part of this answer, sets forth to the best of its knowledge, information and belief, a full, true and particular account of all and singular the personal estate and effects of said Augustin Wirth, and of every part thereof except always and only such property as is described mentioned and set out in defendant's original bill of complaint and the said Schedule and exhibits theretunto attached, which has been possessed by or come to the hands of this defendant or to the hands of any person or persons by its order or for its use or its benefit; with the particular nature, qualities and quantities and true and utmost values thereof and of every part thereof respectively; and how the same and every part thereof has been applied or disposed of and whether any and what part of such personal estate remains outstanding, of, in and to what amount and why, and any and every adverse interest, claim or demand which it may claim or make to the said property or any part thereof other than set out in its original bill of complaint (all of which personal estate and effects &c., are claimed in equity to belong to this defendant). That every deed, book, book of account, letter, paper or writing relating to the matters and properties aforesaid or to any of them or wherein or whereupon there is any note, memorandum or writing relating in any manner thereto (if any such exist) which are now or ever were in the possession of defendant are already in evidence in this action and have been inspected by the solicitors (or their counsel) for the complainant.

Wherefore the defendant prays that it may be adjudged that the

equitable title to the moneys, bonds and mortgages and other property and cop-rights mentioned in defendant's original Bill of Complaint is in the Order of St. Benedict of New Jersey, and adjudging further that the payments made by Benziger Brothers to the Order of St. Benedict of New Jersey were valid payments and that this defendant was entitled to the moneys so paid, and not the complainant, as administrator of Augustin Wirth, deceased; and that this Honorable Court will grant an order directing the complainant to pay over and transfer the moneys, bonds and mortgages and other
72 property herein mentioned to them, and also to assign said copyrights; without deduction for probate or administration expenses, or charges or expenses of any kind.

ALBERT SCHALLER,
Solicitor for Defendant.
ARNOLD & GREENE,
Counsel for Defendant.

EXHIBIT A.

Note of Ignatz and Elizabeth Horvath St. Paul, secured by mortgage 6% int. due March 28, 1904, foreclosed and bid in by administrator	$250.00
Note of Michael & Maria Lunzer, St. Paul Mortgage due Dec. 10, 1903, collected by administrator	225.00
Note of Rudolph & Emma Steinfeld, Minneapolis, Mortgage due Dec. 10, 1903. Foreclosed and bid in by administrator	375.00
Note by Kate Sprunk, widow, St. Paul, Mortgage Sept. 15, 1905 at 7%, note for $900.00, amount due was $433.15 paid to administrator	433.15
One note and mortgage by Roberts in the hands of the National Citizens Bank, Mankato, $1,000, money turned over to administrator	1,000.00
Note of John A. Rickert and Helen Rickert mortgage note due Dec. 20, 1902 6% apparent forgery	800.00
Note of Augusta & Frank Kraemer, due Nov. 1, 1903 7% apparent forgery	500.00
Mortgage note of John A. & Helen Rickert due Nov. 1, 1903, 7% apparent forgery	400.00
Note of Carl and Mary Mielke, due Sept. 21, 1903 7% apparent forgery	500.00
Trunk of Clothing of value	5.00

Endorsed: Answer of defendant to Cross-bill of Complainant. Filed Nov. 16, 1909. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

73 In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

Original Bill.

ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Complainant,
against
THE ORDER OF ST. BENEDICT OF NEW JERSEY, Defendant.

Cross-bill.

Replication of Albert Steinhauser as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, to the Answer of the Complainant, the Order of St. Benedict of New Jersey, to the Cross-bill of Complaint of said Albert Steinhauser as such Administrator.

The replicant, Albert Steinhauser, as administrator of the goods, chattels and credits of Augustin Wirth, deceased, saving and reserving to himself all and all manner of advantage, of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the complainant, The Order of St. Benedict of New Jersey, to the cross bill of complainant of this replicant, the said Albert Steinhauser, as administrator of the goods, chattels and credits of Augustin Wirth, deceased, for replication thereunto, says that he does and will ever maintain and prove his said cross bill of complaint to be true, certain and sufficient in the law to be answered unto by the said, the Order of St. Benedict of New Jersey, the defendant thereto; and that the answer of the said the Order of St. Benedict of New Jersey to the said cross bill of complaint is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters or things the replicant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in and by his said cross-bill of complaint he has already prayed.

Dated December 27th, 1909.

PITZER & HAYWARD,
Of Nebraska City, Nebraska, and
CHAS. L. BURR,
#34 *Nassau St., New York City,*
Solicitors for the Defendant Albert Steinhauser, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

74 In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

Original Bill.

ALBERT STEINHAUSER, as Administrator of Goods, Chattels, and Credits of Augustin Wirth, Deceased, Complainant,
against
THE ORDER OF ST. BENEDICT OF NEW JERSEY, Defendant.

Stipulation for Order Permitting the Filing of Replication, to Which This Stipulation is Attached, to Answer of the Order of St. Benedict of New Jersey to the Cross-bill of Complaint of Albert Steinhauser as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased.

The parties hereto by their respective counsel, hereby stipulate and agree that notwithstanding the same is presented for filing out of time, an order may be entered as of the date of filing, permitting the filing of replication of Albert Steinhauser as administrator of the goods, chattels and credits of Augustin Wirth, deceased to the answer of the Order of St. Benedict of New Jersey to the cross-bill of complaint of the said Albert Steinhauser as administrator.

Dated Nebraska City, Nebraska, Dec. 27, 1909.

PITZER & HAYWARD &
CHAS. L. BURR,
Solicitors for Albert Steinhauser, Administrator of the Goods, Chattels, and Credits of the Estate of Augustin Wirth, Deceased.

Dated St. Paul, Minnesota, December 29, 1909.

ALBERT SCHALLER &
OTTO KUEFFNER,
Solicitors for Order of St. Benedict of New Jersey.

Endorsed: Replication and stipulation. Filed Dec. 30, 1909. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

Testimony.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

Testimony taken on behalf of complainants in accordance with the 67th Rule of Equity, as amended, before John A. Shields, Esq., one of the Standing Examiners of this Court, at the Post Office Building, New York City, Borough of Manhattan, on the 9th day of February, 1909, at 11 o'clock a. m.

Present:

The Examiner.
For Complainants: Messrs. Arnold & Greene, Frank W. Arnold, Esq., and Frederick C. Gladden, Esq., of Counsel.
For Defendant: Charles L. Burr, Esq.

Mr. BURR: The defendant objects to the taking of any testimony, and moves to dismiss the amended bill for the reasons shown upon the amended bill, as follows:

First. That no case is stated in or by said amended bill authorizing the Court to grant the relief sought, or any other relief.

Second. That it appears by complainant's own showing that — the said amended bill that complainants are not entitled to the relief prayed by said amended bill against this defendant.

Third. That said amended bill of complainants' is wholly without equity.

Fourth. That it appears in and by said amended bill that the causes of complaint are stale, and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for a court to take cognizance thereof, or to enforce any further or other answer thereto.

Fifth. That it appears by said amended bill that there are divers other persons who are necessary parties to said amended bill, but who are not made parties thereto. And in particular it appears, that the order or society called in said amended bill, the Benedictine Society of St. Vincent's, Westmoreland county, Pennsylvania; the Abbey of St. Benedict in Kansas, and the Order of St. Benedict of New Jersey, and each one of them, is a necessary party to said amended bill, but the said Benedictine Society of St. Vincent's,
76 Westmoreland county, Pennsylvania; the said Abbey of St. Benedict of Kansas, and the Order of St. Benedict of the State of New Jersey, are not made a party thereto.

Sixth. That said amended bill of complaint is exhibited against this defendant for several and distinct and independent matters and

causes which have no relation to each other and in which, or, in the greater part of which, this defendant is in no way interested or concerned and ought not to be implicated.

Seventh. Because there is no equity in said amended bill, and said complainants have an adequate remedy at law.

Eighth. That it appears in and by said amended bill that more than six years, to-wit, nine years and four months have elapsed since the alleged cause of complaint accrued, to said Order of St. Benedict of New Jersey, and more than six years, to-wit, nine years and four months have elapsed since the alleged cause of complaint accrued to complainants, or to any one of said orders or societies mentioned in said amended bill, whereby said cause of action and cause of complaint, hath become barred by the Statute of Limitation, in such cases made and provided.

Ninth. The Court has no jurisdiction of the subject matter of the action, and the Probate Court of Brown county, Minnesota (together with the Circuit Court of the United States for the District of Minnesota, having concurrent jurisdiction) has exclusive jurisdiction of the subject matter of this action.

Tenth. That it appears in and by said amended bill that said complainants; said Order of St. Benedict of the State of New Jersey, nor any one of said societies mentioned in said amended bill, have not filed, or presented, a claim or demand to the Probate Court of Brown county, Minnesota, of and for their alleged claim and right to said books, copyrights, contract, money and property, as alleged by complainants in said amended bill, nor yet have said complainants; said orders, or any one of them, commenced a suit in the Circuit Court of the United States within and for the District of Minnesota (having concurrent jurisdiction) to establish, and make lawful, such claim, wherefore this Court has not jurisdiction.

Eleventh. It appears in and by said amended bill, that more than one year, to-wit, more than three years have elapsed since the time of granting letters of administration, and the appointment of defendant as administrator of said estate of said Augustin Wirth, deceased, by said Probate Court of Brown county, State of Minnesota,
77 and that the time fixed by said Probate Court and the Statutes of said State for Complainant; said Order of St. Benedict of New Jersey, and all orders or societies named in said amended bill, and all creditors of said estate, to present and file their claims and demands, to said Probate Court, against said estate of Augustin Wirth, deceased, as required by the laws of the State of Minnesota and especially under Sections 4509, 4511 and 4514 of the General Statutes of the State of Minnesota, 1904, has expired whereby said cause of complaint hath become barred by the Statute of Limitation of Minnesota and by the laws of said State, in such case made and provided.

NICHOLAS C. BENZIGER, called and sworn as a witness for complainants, testified as follows:

Direct examination:

By Mr. GLADDEN:

Q. 1. What is your business, Mr. Benziger?
A. Publisher.
Q. 2. Are you in business alone or are you in partnership?
A. In partnership with Mr. Louis G. Benziger.
Q. 3. At what time was the copartnership formed?
A. January 1st, 1895.
Q. 4. And you are still engaged in business under such copartnership?
A. Yes.
Q. 5. Were you acquainted with the late deceased Rev. Augustin Wirth?
A. I was.
Q. 6. Did you at one time enter intoa contract with him?
A. I did.
Q. 7. What was the nature of that contract?

Mr. BURR: I think you had better produce your contract or I will have to object to that.

Q. 8. Well, I call your attention to this Exhibit A here. (Handing paper to witness.) Is this the original contract?
A. Yes.

Mr. GLADDEN: I offer that in evidence.
Mr. BURR: I suggest that it be further identified, if you will, so I will not have to object to the signatures thereto, so I can bring forward personal notice.

Q. 10. I call your attention to the signature of Benziger Brothers.
A. That is my own signature.
[*Q. 10.*] I call your attention to the signature of Augustin Wirth?
A. That is his; we signed it together, I think.

(Contract marked Complainant's Exhibit 1, February 9th, 1909, J. A. S., Exr.)

78 Complainant's Exhibit 1 of this date reads as follows:

"Agreement Made Between Rev. Augustin Wirth, O. S. B., of Elizabeth, N. J., and Benziger Brothers, of New York.

"1. Rev. Augustine Wirth, O. S. B., gives the exclusive sale of all his books to Benziger Brothers, under the following conditions:
"2. Rev. Augustine Wirth, O. S. B., gives to Benziger Brothers the exclusive sale of 'Hunolt Sermons' in five volumes, for the term of ten years.
"3. Rev. Augustine Wirth, O. S. B., will deliver to Benziger Brothers, not later than three months from the date of this agreement, [illegible] on hand of said 'Hunolt Sermons.'

When the volumes have to be reprinted, Benziger Brothers print and bind them, and charge the paper, print and binding to Rev. Augustine Wirth, O. S. B., at the cost price.

"4. Rev. Augustine Wirth, O. S. B., will furnish said 'Hunolt Sermons' to Benziger Brothers with 50% discount from the advertised price.

"5. After the expiration of ten years from the date of this agreement, in consideration of the sum of one dollar, the receipt of which is hereby acknowledged, and without any further payment, the plates of the five volumes of the said 'Hunolt Sermons' become the property of Benziger Brothers, and they have the right to publish the work, without paying any royalty on it. All the stock then on hand of 'Hunolt's Sermons' Benziger Brothers have the right to [but] at cost price of paper, print and binding.

"6. Rev. Augustine Wirth, O. S. B., gives to Benziger Brothers for the term of three years, and also thereafter till six months' notice is given by either of the parties, the exclusive sale of his other books, viz:

" 'New May Devotions,'
" 'The Confessional,'
" 'Eight Short Practical Sermons on Mixed Marriages,'
" 'The Seven Last Words on the Cross,'
" 'New and Old Sermons,' 8 Vols.,
" 'Two Retreats for Sisters,'
" 'Thoughts and Counsels for Consideration of Young Men,'
" 'Lenten Sermons,'
" 'Funeral Sermons,'
" 'The Two-Edged Sword,'
" 'The Sacrament of Penance.'

79 "7. Rev. Augustine Wirth, O. S. B., will deliver to Benziger Brothers, not later than three months from the date of this agreement, the complete stock he has on hand of the above mentioned books. When any of the books has to be reprinted, Benziger Brothers will order the paper, and have the printing and binding done, and will charge the paper, print, and binding at cost price to Rev. Augustine Wirth, O. S. B.

"8. Rev. Augustine Wirth, O. S. B., will furnish the eleven abovementioned books to Benziger Brothers with a discount of 40% from the advertised price.

"9. Benziger Brothers will make payment to Rev. Augustine Wirth, O. S. B., of money due him from the sale of his books during the months of October, January, April and July of each year. Whenever Benziger Brothers charge Rev. Augustine Wirth, O. S. B., for paper and print they will send at the same time as vouchers the bill of the paper manufacturer and of the printer. In regard to the binding Benziger Brothers will submit each time when a book is to be bound an estimate to Rev. Augustine Wirth, O. S. B., for approval. Should Benziger Brothers not hear from Father Wirth within two weeks after having informed him of the price at which they would bind the books, they have the right to bind the books at

the price submitted, provided this price is not higher than that which was charged before.

"10. Rev. Augustine Wirth, O. S. B., has the right during three months from the date of this agreement to furnish his books direct to priests who may order from him within this time.

"11. Rev. Augustine Wirth, O. S. B., will deliver to Benziger Brothers the plates of all the above-mentioned books, and Benziger Brothers will keep them in their printer's vaults, uninsured, and at Rev. Augustine Wirth's risk.

"12. Benziger Brothers will do all they can to push Rev. Augustine Wirth's books, and will treat them as if they were their own publications, will put them in the catalogue of their publications, and make a special circular of them.

"Elizabeth, N. J., July 23rd, 1897.

"(Signed) AUGUSTIN WIRTH, *O. S. B.*
"BENZIGER BROTHERS."

Q. 11. Now, Mr. Benziger, in compliance with this contract did you pay to Rev. Augustin Wirth various sums of money up to the date of his death?

A. We paid regularly when it was due.

80 Q. 12. And after his death what became of the sums which accrued from the sale of the copyrighted books mentioned in the contract?

Mr. BURR: I object to that question as immaterial unless it is shown or claimed that payments were made to a legal representative of Augustin Wirth, deceased.

A. We paid to the Abbot of St. Mary's Abbey in Newark.

Q. 13. That is, the Abbot of the Order of St. Benedict in Newark?

A. Yes.

Q. 14. Those payments continued up to and including the 17th day of October, 1906; is that correct?

A. Well, I made out a statement exactly of the payments, but I don't remember them all here today.

Q. 15. You haven't refreshed your recollection?

A. I gave them a written statement of all the payments, but I cannot remember all those things by heart.

Q. 16. Well, haven't you refreshed your memory from the books this morning?

A. I haven't looked at the books for a long time.

Q. 17. In this contract, Complainant's Exhibit 1, the agreement is made between Rev. Augustin Wirth, O. S. B., and Benziger Brothers of New York, and throughout the contract, wherever the name Rev. Augustin Wirth occurs it is followed by the letters "O. S. B." I ask you what you understand by that?

A. That means Father Wirth belonged to the Benedictine Order.

Q. 18. And was it your understanding that this contract was made with Father Wirth for the benefit of the Order of St. Benedict?

Mr. BURR: Objected to as immaterial.

A. Of course I understood it.

Q. 19. At the time that the contract was made, was there any conversation between you and Father Wirth which indicated that he intended to make the contract for the benefit of the Order?

Mr. BURR: Objected to as incompetent, irrelevant and immaterial, calling for a conversation between the witness and a person now deceased, which conversation is prohibited by the statute of the State of New York in Section 999 of the Code of Civil Procedure.

Mr. GLADDEN: I will withdraw the question.

Q. 20. Mr. Benziger, where did you formerly live before you came to this country?

81 A. I used to live in Einsiedeln, Switzerland.

Q. 21. Were there chapters of the Order of St. Benedict in in that place?

Mr. BURR: Objected to as immaterial.

A. There is a convent of the Benedictine order in that place about a thousand years old. I was born in that place and grew up there and for five years went to school there, so I know more about the Benedictine order than perhaps about any other order.

Q. 22. You are familiar then with the rules of their order?

A. No, I do not know the rules of the order.

Q. 23. Do you know, as a matter of fact, that the members of the order are not allowed to hold property themselves?

Mr. BURR: Objected to as incompetent, irrelevant and immaterial, a statement of the conclusion of counsel and not of a fact, and on the ground that the witness has already answered the question by stating that he is not familiar with their rules.

A. I mean their written rules. I know that they are not allowed to own property.

Q. 24. Well, you knew that at the time that this contract was entered into between you and Rev. Augustin Wirth; is that correct?

A. Yes.

Q. 25. Then it was your understanding at the time that this contract was entered into between you and Rev. Augustin Wirth that the letters "O. S. B." indicated that Augustin Wirth was acting as the agent and on behalf of the Order of St. Benedict; is that correct?

Mr. BURR: I object to the witness' understanding as incompetent and immaterial.

A. That was self-understood.

Mr. BURR: I move to strike out the answer of the witness as not responsive to the question asked, and as incompetent and immaterial.

Q. 26. You mean by "self-understood," Mr. Benziger, that that was the clear understanding between you and Augustin Wirth at that time?

Mr. BURR: I object to the question on the ground that it calls for

conversations or transactions had between the witness and the decedent, Augustin Wirth, and is prohibited by the Code of
82 Civil Procedure of the State of New York and by the statute of the United States in that case made and provided.

A. I know that an agreement made with a Benedictine is as good as if I made it with the head of the order.

Mr. BURR: I move to strike out the answer of the witness as incompetent, irrelevant and immaterial and not an answer to the question asked.

Q. 27. Well, I ask you once more, for the purpose of explaining what otherwise might be ambiguous, what your understanding is of the letters "O. S. B."?

Mr. BURR: I object to the witness' understanding as immaterial.

A. They mean that Father Wirth belonged to the Benedictine Order.

Q. 28. And it was your understanding that he was contracting on behalf of the Benedictine Order at this time?

Mr. BURR: I object to the question on the ground that it is leading and suggestive, and also that the understanding of the witness is immaterial.

A. That was the reason why we put the O. S. B. in the contract to show that we made the contract with the Benedictine and not with a private person.

Mr. BURR: I move to strike out the answer of the witness as not responsive to the question asked, and as incompetent and immaterial.

Q. 29. And what was the reason you put the letters "O. S. B." into the contract?

Mr. BURR: Objected to as immaterial.

A. Because Father Wirth was a Benedictine and whenever the name of one that belongs to the order is written those letters are always added to it to show that he belongs to the order.

Q. 30. Since the 17th day of October, 1906, what has become of the moneys which have accumulated from the sale of these books?

Mr. BURR: Objected to as immaterial unless it is claimed or asserted——

Mr. GLADDEN: I will change the form of the question.

83 Q. 31. Have you retained in your possession, since the 17th day of October, 1906, the moneys which have accrued from the sales of the books copyrighted in this agreement?

A. Is that the date when——

Q. 32. That is the date of the last payment made.

A. We retained that.

Q. 33. By that you mean those sums which have accrued since that last payment?

A. Yes.

Q. 34. Did you do this after consultation with the Abbot?

Mr. BURR: Objected to as incompetent and immaterial and not within the issues of this cause.

A. We did.

Cross-examination.

By Mr. BURR.

X Q. 35. Can you tell me, Mr. Benziger, what sums have accrued since October 17, 1906?

A. I don't know it by heart.

X Q. 36. Can you ascertain that amount for me?

A. In a few minutes I can.

X Q. 37. Have you your books with you?

A. No; I will have to go over to the store.

X Q. 38. Will you produce your books at the next hearing for the purpose of showing what sums have accrued since October 17th, 1906?

A. You can see the books at any time you want to.

It is agreed that the witness will furnish a statement to counsel for both parties taken from the books of Benziger Brothers, showing what sums have accrued by virtue of the contract dated July 23rd, 1897, since October 17th, 1906.

X Q. 39. You believe your last payment under this contract of July 23rd, 1897, was made on or about October 17th, 1906?

A. I couldn't say anything at all.

X Q. 40. I beg your pardon, but you, in answer to a question by counsel, stated that your last payment to the Order of St. Benedict was October 17th, 1906?

A. I did not say that, it was a misunderstanding; I said I couldn't tell.

X Q. 41. You will furnish us with the date of that last payment, will you?

A. Yes, I will.

X Q. 42. Do you recollect being sued with your brother by Albert Steinhauser, as administrator of the goods, chattels and credits of Augustin Wirth, deceased, in an action brought in the Cir-
84 cuit Court of the United States at law, for the Southern District of New York, wherein the complainant demanded of you about the sum of $7,000 alleged to be due by virtue of this contract?

A. I do.

X Q. 43. And that action is still pending?

A. I understand so.

X Q. 44. Do you recollect about the date of the service of the subpœna or summons issued out of that action upon you?

A. Oh, I couldn't remember that.

X Q. 45. Is it not a fact that that summons was served on you on the 17th day of October, 1906?

A. Probably; I can't remember.

It is admitted that the action of Albert Steinhauser, as administrator of the goods, chattels and credits of Augustin Wirth, deceased, against Louis G. Benziger and Nicholas C. Benziger, wherein the plaintiff sought to recover from the defendants at law the sum of about $7,000 was begun in said court on or about October 17th, 1906, and that said action is still pending, undetermined.

X Q. 46. The contract, Mr. Benziger, entered into between you and the decedent, dated July 23rd, 1897, was signed by both of you on or about the date of its date?

A. It was.

X Q. 47. Where was it signed?

A. I do not remember if I called personally with the agreement there or if I sent it by mail, I cannot remember any more. I called several times on him in making that agreement and I don't know when everything was settled if I called personally with the agreement or not.

X Q. 48. Then you don't know whether it was signed in New York or whether it was signed in the State of New Jersey or what state?

A. He was living in the State of Jersey at that time.

X Q. 49. You don't recollect whether the agreement was signed in New Jersey or New York, do you?

A. I couldn't recollect that.

X Q. 50. By looking at the ink, can you tell whether that is your office ink or whether it was both written and signed at the same place?

Mr. GLADDEN: I object to that as incompetent and immaterial.

A. I couldn't say that.

X Q. 51. At the date of that contract, for how many years had you known Augustin Wirth?

85 A. I knew him by name since I am in the country.

X Q. 52. Well, how long is that?

A. I am in the country since 1880.

X Q. 53. And you had known him by name and reputation since 1880?

A. Yes, about.

X Q. 54. What is your business?

A. Publisher and manufacturer of church goods.

X Q. 55. You confine yourself to church publications and to the manufacture of church goods?

A. Yes.

X Q. 56. You are not general publishers?

A. No.

X Q. 57. And you make it your business to keep acquainted with church authors?

A. We do.

X Q. 58. And was Augustin Wirth a church author?

A. He was.

X Q. 59. He wrote a great many books, did he not?

A. He wrote a great many books.

X Q. 60. And as a publisher of church books, when did you begin to buy of him and sell to the public generally his writings?

A. Before we made this arrangement we used to buy the books of him; he manufactured the books and we bought the books from him.

X Q. 61. For how many years?

A. Well, each time a new book came out.

X Q. 62. You followed him in his work and as he would write a new book——

A. There was a demand for his books and then we ordered them from him.

X Q. 63. For about how many years was this going on before?

A. I do not remember when [illegible] books were published; it is printed on the books, you may find it, the date of the copyright will give you when the book was published.

X Q. 64. And you have copies of all of those books now in your possession?

A. We have.

X Q. 65. And will you produce a single copy of each one of them at the next hearing before the Examiner?

A. We will do so.

X Q. 66. You had no contract relation with Augustin Wirth prior to July 23rd, 1897?

A. We did not.

X Q. 67. You bought of him merely as you might buy of any other author?

A. Yes.

X Q. 68. You think you have in your possession now copies of any of his books that you bought of him prior to July 23rd, 1897?

A. Well, that would be impossible to find out; nobody could know.

X Q. 69. An old edition I am talking about?

86 A. We might, yes.

X Q. 70. Will you institute search and see if you have in your possession any old editions of Augustin Wirth's works?

A. Yes.

X Q. 71. I would like a copy if I can get it from you of each book which you may have in your possession that was printed prior to July 23rd, 1897?

A. I will do so.

X Q. 72. Do your books and records show your dealings with Augustin Wirth of the time prior to July 23rd, 1897?

A. They do if we still have the books on hand as far back. We destroy certain books after a great number of years.

Mr. GLADDEN: Objected to as incompetent, irrelevant and immaterial.

X Q. 73. Will you ascertain whether those books are in existence and let us know at the next session before the Examiner?

Mr. GLADDEN: Same objection.

A. I will do so.

X Q. 74. Without those books I understand you cannot tell me the number of years you did business with Augustin Wirth prior to July 23rd, 1897?

Mr. GLADDEN: I object to that as incompetent, irrelevant and immaterial and not within the issues.

A. Without referring to the books I couldn't say anything.

X Q. 75. Nor the extent in money of those transactions?

Mr. GLADDEN: Please note the same objection to all this testimony.

A. I could not.

X Q. 76. Do you know how you paid Augustin Wirth for the books that you bought of him prior to July 23rd, 1897?

Mr. GLADDEN: Same objection.

X Q. 77. I mean by check or cash or how?

A. I suppose like everybody else, by check.

X Q. 78. By check. Will you ascertain for me whether or not those checks are in existence now?

A. I will find out.

87 X Q. 79. Do you know how the payments were made to Augustin Wirth during his lifetime under the contract of July 23rd, 1897?

A. We sent a check for the balance we owed him.

X Q. 80. To whom?

A. Father Wirth.

X Q. 81. Are those checks in existence?

A. They are in existence.

X Q. 82. Will you produce them at the next hearing?

A. All the checks since 1897?

X Q. 83. No, I think not; if you produce one or two or three, provided Mr. Arnold here then stipulates with me that all payments under the contract were made in the same manner that those were made. How about that, Mr Arnold?

Mr. ARNOLD: I couldn't do that because I don't know whether that is the fact or not.

Mr. BURR: Then I will have to have them all.

X Q. 84. Mr. Benziger, do you know who drafted that contract of July 23rd, 1897?

Mr. GLADDEN: I object to the question as irrelevant and immaterial.

A. I think I did, or one of the employés.

X Q. 85. At your dictation probably?

A. Well, I don't mean dictation, just told him the sense of it, you know, and he got it up.

X Q. 86. What does O. S. B. stand for as an abbreviation?

A. I can tell you if it hadn't been for the O. S. B. we wouldn't have made this agreement with Father Wirth. If Father Wirth hadn't been a Benedictine we wouldn't have made this agreement.

Mr. BURR: I move to strike out the answer of the witness as not responsive to any question asked.

X Q. 87. Do you know what the letters O. S. B. stand for as an abbreviation?

A. It is for the Latin "Ordo Sancti Benedict."

X Q. 88. And in English, "Order of St. Benedict?"

A. Yes, that is the translation of it.

X Q. 89. The O. S. B. after Augustin Wirth's name is descriptive, is it not, of the fact that Augustin Wirth was a member of the Order of St. Benedict?

88 Mr. GLADDEN: We object to that on the ground that it calls for the operation of the witness' mind, and a conclusion and not the fact.

A. It is.

X Q. 90. And that was your purpose in putting it in the contract?

A. Yes, because we would not have made any contract with "Mr. Augustin Wirth."

Mr. BURR: I move to strike out all that follows the word "because" as not responsive to the question asked, and as argumentative.

X Q. 91. You stated, in answer to a question by your counsel, that it was your understanding that this contract was made by Augustin Wirth for the benefit of the Order of St. Benedict?

A. If we had been in doubt I would have put in the agreement to whom it was to be paid after his death.

X Q. 92. That is just the point. If it was made by Augustin Wirth for the benefit of the Order of St. Benedict, why didn't you put in the contract that the money would be payable to the Order of St. Benedict after Augustin Wirth's death?

A. Because that was self-understood for us.

X Q. 93. That was self-understood?

A. Yes.

X Q. 94. That was your interpretation of that contract?

A. Yes.

X Q. 95. You wrote this contract?

A. I can't remember if I wrote it myself, but I gave the idea for it. I settled all those points with Father Wirth personally.

X Q. 96. And have you drafted a good many contracts before that time, had you—publisher's contracts similar to this?

A. A great many agreements.

X Q. 97. You had prior to that time?

A. Yes.

X Q. 98. Did you know Father Hilary, if I may use the American name—I presume the Rev. Hilary Pfraengle—before July 23rd, 1897?

A. I did.

X Q. 99. Did you know what position he occupied with respect to the Order of St. Benedict?

A. I knew it.

X Q. 100. You knew that he was the head of that order or President of it?

A. He was.

X Q. 101. In all your testimony with respect to the Order of St. Benedict, what order of St. Benedict are you referring to?

A. There is only one Order of St. Benedict.

X Q. 102. All right; what order of St. Benedict is that?

89 A. Why, just the one Order of St. Benedict.

X Q. 103. Well, what is it and where is it?

A. Well, it is over the whole world.

X Q. 104. Over the whole world—an unincorporated religious association?

A. I suppose so.

X Q. 105. Then you, in talking of the Order of St. Benedict, have reference to that order that you knew in Italy that is over a thousand years old?

A. You mean the remarks with reference to the agreement or the general remarks about the order?

X Q 106. I mean all your remarks that referred to the Order of St. Benedict. Now, what Abbey or what institution are you talking about?

A. Yes, I referred to the whole Order of St. Benedict.

X Q. 107. Yes, and the one that you knew in Italy that is over a thousand years old?

A. That was the one in Switzerland.

X Q. 108. Switzerland?

A. Yes.

X Q. 109. You knew that all of Augustin Wirth's books were copyrighted, did you not?

A. I think they were all copyrighted.

X Q. 110. Well, when you entered into this contract you knew that they were copyrighted books?

A. Well, that had nothing to do with it.

X Q. 111. I am only asking for your knowledge, if you were then acquainted with the fact that they had been copyrighted?

A. If they are copyrighted the copyright is printed on the book.

X Q. 112. Well, you knew that the copyright was printed on the book at that time, July 23rd, 1897, did you?

A. I couldn't swear whether I looked at it or not; you can see on the books whether it is copyrighted or not.

X Q. 113. That is not the point I am trying to get at. You were getting the right——

A. I didn't care if they were copyrighted or not.

X Q. 114. You were getting the right to the exclusive publication of those books, were you not?

A. We did.

X Q. 115. You didn't want anybody else to publish those books, did you?

A. No.

X Q. 116. You wouldn't be paying Augustin Wirth these royalties if everybody else could publish them?

A. At the same time, if his books were not copyrighted and he is a member of the Order of St. Benedict, no Catholic publisher would have published them.

X Q. 117. What I want to know is—I don't care anything about your mental attitude at that time, whether you cared or didn't care at that time—I want your knowledge. Did you or did you not observe?

A. I couldn't tell you if they are; I didn't look at the books to see if they were copyrighted or not.

90 X Q. 118. That was part of the self-understanding that existed between you and Augustin Wirth, that authors copyrighted their books?

A. No, we didn't talk about that.

X Q. 119. Mr. Benziger, I show you a letter dated Chicago, February 20th, 1905, and ask you if that is a letter written by Benziger Brothers?

A. This letter is signed by the manager of our house in Chicago.

X Q. 120. That is his signature attached to the letter?

A. That writing here, that means Brown.

Mr. BURR: I ask that [*that*] it be marked Defendant's Exhibit A for Identification.

(Letter marked Defendant's Exhibit A for identification, February 9th, 1909, J. A. S., Ex'r.)

X Q. 121. I show you another letter dated New York, February 25th, 1905, and ask you if that letter was written and signed by Benziger Brothers?

A. That is signed by me personally in the name of the firm.

Mr. BURR: I ask that that be marked Defendant's Exhibit B for identification.

(Letter marked Defendant's Exhibit B for identification, February 9th, 1909, J. A. S., Ex'r.)

Mr. BURR: I ask that that be marked Defendant's Exhibit B for identification, you say, "We beg leave to enclose herewith a copy of a letter from the Right Rev. Hilary Pfraengle, O. S. B., Abbot of St. Mary's Abbey, Newark, New Jersey." Have you that original letter in your possession?

A. I suppose so.

X Q. 123. Will you make search and produce that at the next hearing?

A. Yes.

X Q. 124. I hand you letter dated March 14th, 1905, and ask you if that letter was written and signed by Benziger Brothers?

A. The letter is signed by one of our employés.

X Q. 125. Did he have authority to sign letters?

A. He had.

X Q. 126. Then that letter is signed with the authority of Benziger Brothers?

A. It is.

Mr. BURR: I ask that that letter be marked Defendant's Exhibit C for identification.

91 (The letter is marked Defendant's Exhibit C for identification, February 9th, 1909, J. A. S., Ex'r.)

X Q. 127. Are the letter files of your Chicago office in this city or Chicago?

A. They are in Chicago.

X Q. 128. Will you produce at the next hearing before the Examiner a letter dated February 18th, 1905, to you from Albert Steinhauser at the New York office?

A. Yes.

X Q. 129. And I also want a letter of February 27th, 1905, same party to you at New York?

A. Yes. That is about the time when we destroyed letters, that might just have come in at the last moment.

(Further cross-examination of this witness suspended.)

HILARY PFRAENGLE, called and sworn as a witness for complainants, testified as follows:

Direct examination:

By Mr. GLADDEN:

Q. 1. Where are you situated now, Father?

A. In Newark, New Jersey.

Q. 2. And what is your position there?

A. I am the Abbot of the Abbey and President of the Order of St. Benedict of New Jersey?

Q. 3. Did you know Augustin Wirth?

A. Yes.

Q. 4. Where did you first make his acquaintance?

A. When I was ten years old I made his acquaintance, when he was ordained a priest in 1852.

Q. 5. Where was that?

A. That was at St. Vincent's Arch Abbey—it was only an Abbey then—St. Vincent's, Westmoreland County, Pennsylvania.

Q. 6. Did you know him from that time up to the date of his death?

A. Yes.

Q. 7. How old are you now?

A. I will be sixty-six in May.

Q. 8. How long did you continue to know Father Wirth at St.

Vincent's Abbey in Pennsylvania—how long did he stay there, I mean, after you formed his acquaintance?

A. He was there some years.

Q. 9. And from there where did he go?

A. He went to Kansas.

Q. 10. And from Kansas where did he go?

A. He went to Minnesota for seven years from 1868 to 1875 and then returned to St. Vincent's, 1875 to 1880, the greater part at Greensburg, Pa., as pastor of a church, by permission of the
92 Abbot of St. Vincent's, he went to Elizabeth, N. J., in 1880.

Q. 11. And from St. Vincent's where did he go then?

A. He did parish work there, I think it was; he came back again from Kansas. I know he had charge of a congregation in Greensburgh.

Q. 12. Did Father Wirth become a member of the Abbey in New Jersey?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness and not the best evidence.

A. Yes.

Q. 13. At the time that he joined the Abbey in New Jersey, were you there then?

A. I was then the Abbot.

Q. 14. Now, Father Hilary, are you familiar with the history and organization of the Order of St. Benedict?

A. I am.

Q. 15. Will you state it briefly?

Mr. BURR: I object to it as irrelevant, incompetent and immaterial, as hearsay and not pertinent to the issues in this action.

Q. 15. Proceed and state?

A. The founder of the Order of St. Benedict was St. Benedict.

Q. 16. And when was it founded?

A. He was born in 480 and died in 543, and he——

Q. 17. That is, it was founded in the 5th or 6th century?

A. Yes, the latter part of his life he wrote his rule and established the order.

Q. 18. Is the order well known throughout the civilized world?

Mr. BURR: Objected to as immaterial.

A. Yes, it is certainly; the order civilized Europe.

Mr. BURR: It is stipulated that this line of testimony be taken subject to objection, to be made at the close of this line.

Q. 19. Is the history of the order a matter of common knowledge among the members?

A. It is.

Q. 20. Now, what was the purpose of it, was it to live in community apart from the world?

A. Strictly so.

Q. 21. State what was the basis of the conduct and the organization of the various chapters of the Order of St. Benedict?

93 A. It was to lead a common community life and to concentrate force and so be able to convert people, preach to people.

Q. 22. You don't understand me; not the purpose of it but the basis upon which their rules were established?

A. The three vows.

Q. 23. And where were those three vows found?

A. They are found in the Gospel.

Q. 24. And what was the Gospel?

A. I mean the Holy Bible.

Q. 25. Was there a direct expression of the rules by which the members were guided in any form?

A. I don't rightly understand the question—it was founded on the vows, the vows were obedience, chastity and poverty.

Q. 26. And are those vows found in any printed or written form?

A. They are not expressly mentioned in the Holy Writ but they are explicitly mentioned in this holy rule.

Q. 27. Well, what is the rule?

A. What is the rule?

Q. 28. Yes.

A. Well, it is a collection of such mandates and requirements that he made of those that wish to join, to be under his guidance.

Q. 29. I hand you this book and ask you to look at it. (Handing book to witness.) Is that a copy of the rules of St. Benedict as laid down by the founder of the society?

A. Yes. The rule of St. Benedict was never changed; it is identical to-day with the original. The only change that did take place were from time to time and when some part of the rule had to be made easier on account of persons and circumstances and times, and they came in as by-laws, but the rule itself was never changed, only explained.

Q. 30. I call your attention to Chapter 33 of that rule.

A. Yes.

Q. 31. This chapter is entitled, "Whether Monks ought to have anything of their own."

A. They are not allowed to have anything.

Mr. GLADDEN: I offer that portion of the rule in evidence.

Mr. BURR: I object to it as incompetent, irrelevant and immaterial and not binding upon the defendant in this action; upon the further specific ground that no proper foundation has been laid for the introduction of such chapter in evidence. In making this objection, I do not waive my right to make the more comprehensive objection to this line of testimony at the conclusion.

94 Mr. GLADDEN: It is offered in evidence as Chapter 33 of the Rules of St. Benedict.

(Same marked Complainant's Exhibit 2, February 9th, 1909, J. A. S., Ex'r.)

Complainant's Exhibit 2 reads as follows:

"The vice of personal ownership must above all things be cut off

in the monastery by the very root, so that no one may presume to give or receive anything without the command of the Abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for anyone to have anything which the Abbot did not give or permit him to have. Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if anyone should be found to indulge this most baneful vice, and having been admonished once and again, doth not amend, let him be subjected to punishment."

Q. 32. Now, is Chapter 33 still in force in the Abbey of which you are the Abbot?

A. Yes.

Q. 33. Was it in force in the Abbey of Westmoreland at the time Father Wirth joined there?

A. Yes.

Q. 34. And was it also in force in Kansas?

A. Yes.

Mr. BURR: The defendant objects to each and every question asked since the stipulation last above entered into—and every question seperately—and to each and every answer given thereto by the witness separately, for the specific reasons and upon the grounds following:

First. That they are incompetent, irrelevant and immaterial and as not pertinent to or within the issues of this cause.

Second. That the questions call for and the answers disclose but hearsay testimony.

Third. That no proper foundation has been offered or laid for the introduction of the testimony purported to [—] contained in the answers given.

Fourth. That it is apparent from the answers that the witness is not testifying from his own knowledge.

95 Fifth. And the defendant moves separately, to strike out the answers to said questions, each separately upon the ground and for the [seasons] last above stated.

Q. 35. Father Hilary, I call your attention to a paper I hand you. Will you examine it and say what it is?

A. This is the formula by which he made his vows, he took his vows and made his profession.

Mr. BURR: I move to strike out the last part of the witness' answer *ing* beginning "by which he made his vows," on the ground that it is not responsive to the question asked as there is no proof of the making of vows.

The WITNESS: This is his own handwriting.

Q. 36. In whose handwriting is this paper?

A. Augustin's.

Q. 37. His own handwriting?
A. Yes. I got that formula from St. Vincent's, I must return it.
Q. 38. In what language is that?
A. Brother Augustin made his profession in Latin.
Q. 39. Do you understand Latin?
A. Yes.
Q. 40. Is a translation appended thereto?
A. Yes, it is word for word, a literal translation into English.
Q. 41. I call your attention to the signature?
A. Yes.
Q. 42. And the cross?
A. Yes.
Q. 43. *What*, that made by Father Wirth?
A. Yes. This cross is made on the altar after the making of the vows and the making of the promises. This is as counsel's seal, it is made on the altar after it was signed.
Q. 44. By the persons themselves?
A. Yes.
Q. 45. On the altar?
A. On the altar.
Q. 46. And signs the cross under his name?
A. Signs the cross.

Mr. GLADDEN: I offer in evidence the translation.
Mr. BURR: The defendant objects to the introduction of the paper offered in evidence on the ground that it is irrelevant, incompetent and immaterial and not pertinent to the issues of this cause and not binding upon the defendant here and on the groud also that no proper foundation has been laid for its introduction in evidence.

96 Q. 47. Who made this translation?
A. One of our fathers.

(The translation is marked Complainant's Exhibit 3, February 8th, 1909, J. A. S., Exr.)
It is stipulated that Complainant's Exhibit 3 is a true and correct translation from the Latin into English of Complainant's Exhibit 3.

Complainant's Exhibit 3 of this date is as follows:

"In the Name of Our Lord Jesus Christ,
Amen!
"I, Brother Augustin Wirth, a Bavarian of the diocese of Wuerzburg to the honor of Almighty God, of the ever Blessed Virgin Mary, and our holy Father St. Benedict, and of all the saints, by these present vows promise stability and the conversion of my morals, and obedience according to the Rule of the same holy Father St. Benedict, in the presence of God and His Saints, whose relics are here present in the church, and also in the presence of the Right Reverend Father in Christ and Lord Boniface, the Superior of this Monastery of St. [illegible] of you Rev. Fathers and Brothers here present: in the name of the Father, and of the Son and of the Holy Ghost. Amen.

"In Witness Whereof I have written with my own hand this present paper in this venerable place of St. Vincent, in the year one thousand eight hundred and fifty-two from the Incarnation of Our Lord, on the feast of the Assumption of the Bl. Virgin Mary, the fifteenth day of August.

____ ____,

"(Sign of the Cross.)"

Q. 47. Where did you get this, Father Hilary, this Exhibit 3; describe how you got it?

A. By writing for it to St. Vincent's Abbey, now an Arch Abbey, and they took it from the records there and sent it here; that is, it was loaned, to be returned again afterwards.

Further hearing adjourned to Tuesday, February 16th, 1909, at 10 o'clock, at the Public Administrator's Office, 119 Nassau Street, New York City.

STEINHAUSER
vs.
BENZIGER.

97 NEW YORK, *February 16th*, 1909.

Met pursuant to adjournment.
Present: Counsel as before.

HILARY PFRAENGLE, resumed:

Direct examination.

Continued by Mr. GLADDEN:

Q. 48. Father Hilary, at the close of the last hearing, you testified in regard to Complainant's Exhibit 3, that you secured it by writing for it to St. Vincent's Abbey and they took it from the records there and sent it here. Since that time—I call your attention to this paper and ask you to state what that is and how you got it (handing paper to witness)?

A. I was required to show that the formal profession of the vows that Augustin made were kept in the archives of St. Vincent's and the original copy which was sent us was genuine and hence it was required that the proof be brought to show who took this paper out of the archives, and this is an affidavit which was sent to me at my request from St. Vincent's Abbey, Westmoreland County, Pennsylvania.

Mr. GLADDEN: I offer that in evidence.

(The same is marked Complainant's Exhibit 4 for identification. February 16th, 1909, J. A. S. Exr.)

Q. 49. I call your attention to this paper, Father Hilary; is that in Father Wirth's handwriting?

A. That is his handwriting.

Q. 50. Where did you get that, father?

A. That was signed by him when he made application and he had to give it to me.

Mr. BURR: I move to strike out the answer of the witness because it is apparent that he is not testifying to matter within his own knowledge.

Q. 51. Where did you get this paper before it was brought here, Father Hilary?

A. That was given me and put into our archives.

Q. 52. Are you now producing it as part of the archives of the Order of St. Benedict of New Jersey?

A. Yes.

Q. 53. That is your signature?

A. The upper, yes.

Q. 54. And the other signature is the signature of Father——

A. Innocent Wolf.

98 Q. 55. Do you know, Father Hilary, the handwriting and the signature of Innocent Wolf?

A. Yes.

Q. 56. And is that his handwriting and signature?

A. That is his handwriting, yes.

Mr. GLADDEN: I now offer it in evidence.

(Marked Complainant's Exhibit 5, February 16th, 1909, J. A. S. Exr.)

Mr. BURR: The defendant objects to the introduction of Complainant's Exhibit 5, on the ground that the same is incompetent, irrelevant and immaterial, no proper foundation has been laid for its introduction and because it does not prove or tend to prove any material averment of the amended bill in equity.

It is hereby stipulated that the following is a correct translation of Complainant's Exhibit 5 and that by the making of this stipulation and similar stipulations heretofore made concerning translations of documents offered by the complainant which are written in Latin, the defendant does not waive any objection made to the introduction of the original.

The following is a copy of Complainant's Exhibit 5 of this date:

"Herewith I declare and testify that I, the undersigned having first obtained the permission of both Rt. Rev. Abbots, namely, the Rt. Rev. Innocent Wolf, Abbot of St. Benedict's in Kansas, and the Rt. Rev. Hilary Pfraengle of St. Mary's in Newark, N. J., do voluntarily transfer my stability from the Abbey of St. Benedict in Kansas to the Abbey of St. Mary, Newark, N. J.

"In faith thereof with my own hand.

"AUGUSTINE WIRTH, *O. S. B.*,
"HILARY PFRAENGLE, *O. S. B.*,
Abbot of St. Mary's, N. J.

"[Seal of St. Mary's Abbey, Newark, N. J.]

"Approved, the undersigned
"ARCHABBOT BONIF. WIMMER,
"President of Congregation.

"May 18, 1887.

"[Seal of the Parish of the Congregation.]

"I give my consent,
"INNOCENT WOLF, *O. S. B.*

99 "Abbot, the 15 of May, 1887."

Q. 57. Now, this Exhibit 5 is dated May 15th, 1887, and from and after that time was Father Wirth a member of the Abbey of St. Mary's of the Order of New Jersey?

Mr. BURR: I object to the question on the ground that the witness has not yet shown himself competent or qualified to testify as asked, and upon the further ground that the question calls for the conclusion of the witness and not for a fact, and as incompetent, irrelevant and immaterial.

A. Yes.
Q. 58. And did he remain such up and down to his death?

Mr. BURR: I object to the question on the ground that the witness has not yet shown himself competent or qualified to testify as asked, and upon the further ground that the question calls for the conclusion of the witness and not for a fact, and as incompetent, irrelevant and immaterial.

A. He remained and died such.
Q. 59. From what did you receive this, Father?

Mr. BURR: Objected to as immaterial.

A. I received it from Augustin when he had petitioned for it and received it.
Q. 60. He handed it to you himself?
A. He had to apply for that transfer himself.

Mr. BURR: I move to strike out the answer of the witness as not responsive to any question asked and as a conclusion of the witness.

Q. 61. Do you know, as a matter of fact, Father Hilary, that it was necessary for him to apply for this before he could get it?

Mr. BURR: I object to that as leading and as incompetent and immaterial.

A. Yes.
Q. 62. And, as a matter of fact, he did apply for this document?

Mr. BURR: I object to that as leading and suggestive and as incompetent and immaterial.

A. Yes.
Q. 63. And finally procured it and delivered it to you?

Mr. BURR: I renew the objection, on the ground that the question is leading and suggestive.

100 A. Yes.

Q. 64. Now, Father Hilary, you testified on your previous examination in regard to the significance of Rule 33 of the Order of St. Benedict, which is the rule of poverty. Was that rule in force in 1887 when Father Wirth joined the order in New Jersey?

Mr. BURR: I object to that as not the best evidence and as incompetent and immaterial.

A. Yes.

Q. 65. It was in force then?

A. It was in force.

Q. 66. It remained in force up to the time of Father Wirth's death, did it?

A. Yes.

Mr. BURR: To each of these questions I renew the objection last above made, that they are not the best evidence and as incompetent and immaterial, and I move to strike the answers out for the reasons given, and I again direct counsel's attention to the fact that his questions are uniformly leading and suggestive.

Q. 67. Will you state once more, Father Hilary, what is the significance of the Rule 33 on page 32?

Mr. BURR: The defendant objects on the ground the question is incompetent, irrelevant and immaterial, calling for a conclusion of the witness or his opinion, and not for a fact.

A. St. Benedict was born when the Roman Empire was crumbling. The old noble Romans had become effeminate through the excess of power which they had gained by subjecting the nations to their rule, they became negligent, and the kingdom was crumbling. It was about this time that St. Benedict was born, in 480, and he died in 543. It was at a time when the Romans became helpless that the wild hordes of the north were overrunning Europe, the Huns and the Goths and the Moors in Spain, and they were destroying everything. It was then that St. Benedict called together all those that would abandon all things that would distract them, he called upon them to sacrifice all their worldly goods and all claims thereto and live in community and give obedience in common with the vow of chastity and not to marry and live a community life, and in this way be able to teach the people, to work among them as missionaries and to educate them, especially the youth, and that is how the Order was formed, and that is how the vows, called the counsel in Holy Writ, became the foundation of his rule,
101 which was obedience, stability, chastity and poverty. They lived in common with each other and whatever they had the community gave to the monastery, only claiming what they need of necessity, they have always been taken care of like the children of a family. That order then grew and spread in the lifetime of St. Benedict, it spread into France and established monasteries in

France and also Italy and finally it went all over Europe, and in 1846 it was transplanted over to this country, the United States

Mr. BURR: The defendant moves to strike out the answer of the witness as not responsive to the question asked and not bearing upon the issues of this controversy as hearsay and because no proper foundation has otherwise been laid for the introduction of such evidence, and as incompetent, irrelevant and immaterial.

Q. 68. As a matter of fact, when this vow was made, do you know of your own knowledge, of any member that joined the order; do you know of your own knowledge whether or not it was accompanied by an actual transfer of property that that member had to the society?

Mr. BURR: The defendant objects as incompetent, irrelevant and immaterial and not within the issues of this action.

A. Yes.

Q. 69. Was it so accompanied by an actual transfer of whatever property that the member joining the order had at the time that he joined?

Mr. BURR: The defendant objects to the question as incompetent, irrelevant and immaterial and as not within the issues of this action.

A. In so many words that was not always said, but it was always understood by the vows.

Mr. BURR: The defendant moves to strike out so much of the answer of the witness as concerns the understanding concerning which he testified in said answer as incompetent, irrelevant and immaterial.

Q. 70. As a matter of fact, this was always done, was it, Father Hilary?

Mr. BURR: The defendant objects to the question on the ground that the counsel's question is leading and suggestive, on the ground that it has already been answered and as incompetent, irrelevant and immaterial.

A. That is always contained in the vow of poverty.

102 Mr. BURR: The defendant moves to strike out the answer of the witness on the ground that it is not responsive to the question asked.

Q. 71. I mean to say, as a matter of fact, this joining of the order was alway- accompanied, was it not, by the actual transfer of whatever property they had?

Mr. BURR: The defendant objects on the ground that the counsel's question is leading and suggestive, on the ground that it has already been answered and as incompetent, irrelevant and immaterial.

A. When they had anything.

Q. 72. And the joining of the order contemplated also an agree-

ment that the member should assign to the order any property which he might have or any rights in any property he might acquire thereafter?

Mr. BURR: I object to that on the ground that it asks for the conclusion of the witness, that his answer given must necessarily be his conclusion and as incompetent, irrelevant and immaterial.

A. Yes.

Q. 73. Now, Father Hilary, how long have you been the Abbot in charge of St. Mary's Abbey in New Jersey?

A. Since November, 1886.

Q. 74. As Abbot of the Abbey of St. Mary's in Newark, New Jersey, since 1886, have you had entire charge of the administration of the order?

A. Yes, of New Jersey.

Q. 75. Are you familiar with all the details concerning the vows of chastity, poverty, obedience and stability?

A. Yes.

Q. 76. Are you familiar with the conduct of the members?

A. Yes.

Q. 77. Do you know what obligations the members assume at the time they join the Abbey?

A. Yes.

Q. 78. And do you know what the nature of the vows are?

A. Yes.

Q. 79. And you know what the understanding between the members and the order is when they join?

A. Yes.

Q. 80. Then, concerning these facts, that is, I mean concerning the testimony which you have given as to the vows, as to the effect of those vows, as to the agreement between the order and the members, you have given that from your knowledge, have you not?

Mr. BURR: I object to the question of counsel because it is not specific enough to permit counsel for defendant to formulate
103 an intelligible objection, and on the further ground that the question and the testimony solicited is incompetent, irrelevant and immaterial.

A. Yes.

Q. 81. And the original Rule of St. Benedict to which you have testified at length, Father Hilary, I understand that you have said that one of the purposes of the order is to hold and acquire real estate for the benefit of the community; is that so?

Mr. Burr: I object to that as incompetent, irrelevant and immaterial.

A. That is not your question, but it is not essential.

Q. 82. No, but that is one of the powers?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial and not the best of evidence.

A. Yes.

Q. 83. That is, the community had the right, the power, to acquire property, both real and personal, for the benefit of the community itself?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial, calling for a conclusion and not the best evidence.

A. Yes.

Q. 84. Father Hilary, the Benedictine Society in New Jersey is an incorporated body, is it not?

A. Yes.

Mr. GLADDEN: I offer in evidence the articles of incorporation.

(Same marked Complainant's Exhibit 6, February 16th, 1909, J. A. S., Ex'r.)

Mr. BURR: The defendant objects to the introduction of Exhibit 6 on the sole ground that it is immaterial and irrelevant.

It is stipulated and agreed that the following Complainant's Exhibit 6 is a true copy of an "Act to Incorporate the Order of St. Benedict in New Jersey," approved March 5, 1868.

(The following is a copy of Complainant's Exhibit 6.)

"An Act to Incorporate the Order of St. Benedict in New Jersey.

"1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that Boniface Wimmer, Roman Hill, Oswald Mossmuller, and Peter Henry Lemke and their associates, members of the Society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth, be, and they are hereby consti-
104 tuted a body politic and corporate by the name and style of the 'Order of St. Benedict,' of New Jersey, to have perpetual succession, to use a common seal, and alter and renew the same at pleasure, to take, hold and enjoy lands, tenements and hereditaments, and to make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to nor inconsistent with the constitution of the United States or of this State; and provided also, that the clear yearly income of the real estate to be held by said corporation, exclusive of the houses occupied by the Order in this state and grounds thereto attached, shall not exceed the sum of three thousand dollars; and provided, that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof.

"2. And be it enacted, that the essential objects of said corporation shall be the education of youth and the establishments of churches and conducting service therein.

"3. And be it enacted, that no misnomer of the said corporation or their successors shall defeat or annul any gift, grant, devise or bequest to or for the said corporation; provided, that the intent of the party or parties making such gifts, grant, devise or bequest,

shall sufficiently appear on the face of the deed, will, grant or other writing whereby any estate or interest was intended to pass to or for the said corporation.

"4. And be it enacted, that any person or persons now holding or who may hereafter hold any goods, chattels or property, real or personal estate, or interest whatever in trust or for the use of the Order of St. Benedict, in this state or any of the members thereof are hereby authorized to convey, transfer, grant, and make over the same to the corporation hereby created, freed and discharged from all such trusts; provided, that no private rights or vested interest shall be affected or in any way prejudiced by such conveyance to the corporation.

"5. And be it enacted, that this act shall be deemed a public act, and take effect immediately.

"Approved March 5, 1868."

Q. 85. What is this, Father Hilary? (Handing witness paper.)

Mr. BURR: The defendant objects as incompetent, irrelevant and immaterial, and on the further ground that the document when proven shows on its face what it is.

105 A. These are the by-laws of the Order of St. Benedict of New Jersey.

Mr. BURR: Now, then, to the answer I move to strike it out as incompetent, irrelevant and immaterial, no proper foundation having been laid and the witness not having been properly qualified to testify.

Q. 86. Were you present at the meeting when these by-laws were adopted?

A. I was not in Newark then and those who signed it are all dead.

Q. 87. Do you produce those from the archives of the chapter?

A. Yes.

Q. 88. And they were there contained since they were made?

A. Yes.

Q. 89. And are those the by-laws which are now in force as the by-laws of the Order of St. Benedict in St. Mary's, New Jersey?

Mr. BURR: Objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q. 90. Were they in force in 1887 when Augustin Wirth joined the order?

Mr. BURR: Defendant objects to the question as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

A. They were existing then.

Q. 91. At the time that Father Wirth joined the Abbey in Newark you were the Abbot?

A. Yes.

Q. 92. And at that time those by-laws that you now have in your hand were in force?

A. Yes.
Q. 93. And they are still in force, are they not?
A. Yes.

Mr. GLADDEN: I offer them in evidence.
Mr. BURR: Defendant objects to their introduction as incompetent, irrelevant and immaterial.
(By-laws marked Complainants' Exhibit 7, February 16th, 1909, J. A. S., Ex'r.)
It is stipulated and agreed that the foregoing Complainants' Exhibit No. 7 is a true copy of the original Complainants' Exhibit 7.

The following is a copy of Complainants' Exhibit 7:

"Constitution and By-Laws of the Order of St. Benedict of New Jersey.

106 "Section I. The name, style and title of this Corporation shall be the 'Order of St. Benedict of New Jersey.'

"Section II. The object of this Corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with principles and general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church.

"Section III. The officers of the Corporation shall consist of a President, First Vice-President, Second Vice-President, Treasurer and Secretary. The Rt. Rev. Abbot of St. Mary's Abbey, 528 High St., Newark, New Jersey, or the administrators thereof, in case of vacancy shall be ex-officio President; the Very Rev. Prior of St. Mary's Abbey shall be ex-officio First Vice-President, and all Pastors of the Order of St. Benedict in New Jersey whose deeds are held in trust by this Corporation shall be ex-officio Second Vice-President; the President is also acting Treasurer; the Secretary is annually elected by a majority of the members.

"Section IV. The President shall preside at the meetings, shall call extra meetings, when necessary, and shall have full power to make, execute, sign, seal and deliver all bonds, notes, specialties *of* and other instruments in writing whatsoever, which shall be necessary to the proper conducting, carrying on and transacting the temporalities of the Order, provided the restriction in the next section is not transgressed.

"Section V. In all matters relating to the sale of real estate or mortgage of real estate, to deposits, loans or increasing of any indebtedness whatsoever, exceeding the sum of one thousand dollars, in order to be valid must be confirmed by a majority of the members, which at all times shall constitute a quorum.

"Section VI. The President as Rector of St. Mary's Roman Catholic Church, High Street, Newark, N. J., and Superior of the Order of St. Benedict of New Jersey is also acting Treasurer, and hence shall receive all moneys accruing from St. Mary's Church and the other churches, colleges, houses, and other real estate belonging

to or held in trust by the said Order of St. Benedict of New Jersey, paying at the same time close attention that regular accounts of all receipts and disbursements be kept, so as to be able to present a faithful condition of the finances at the regular meetings of the said Order of St. Benedict of New Jersey.

107 "Section VII. It shall be the duty of the First Vice-President to preside at the regular meetings, in the absence of the President.

"Section VIII. It shall be the duty of the Second Vice-Presidents as Rectors of the Churches whose deeds are held in trust by this Corporation to render annual statements of their charge to the President.

"Section IX. It shall be the duty of the Secretary to keep a minute record of the meetings and conduct the correspondence of the Corporation under the supervision of the President.

"Section X. To become and to be a member of this Corporation it is absolutely necessary.

"1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

"To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church.

"Section XI. Membership is lost at once:

"1. By being dismissed according to the disciplinary Statutes of the Order of St. Benedict of New Jersey approved of by Pope Pius IX for the American Cassinese Congregation of Benedictines.

"2. By voluntary leaving the Order for any purpose whatsoever.

"3. By joining any other order or secret society or any other religious denominations.

"Section XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for the following up and carrying out of the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

108 "And, moreover, that each member, individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey.

"Section XIII. No addition, alteration or amendment shall be made to this constitution without a vote of two-thirds majority of the members present.

"By-Laws.

"Article I. This Corporation shall meet on the last Wednesday of August of each successive year for the promotion of its objects and the transaction of business.

"Article II. There shall be an annual meeting on the first Wednesday of February to elect a Secretary and to hear the financial statement of the President.

"Article III. Special meetings may be called by the President at or without the request of the members.

"Article IV. A majority of all members shall at all times constitute a quorum to transact business.

"Article V. The revenues and disbursements of churches and colleges are received and made by the respective rectors of such institutions and a detailed statement of all sent to the President.

"Article VI. All expenditures exceeding one hundred dollars and made by rectors of churches and colleges belonging to or under the charge of this Corporation shall be invalid unless approved of in writing by the President.

"Article VII. The same rule in reference to the amendment of the constitution shall also apply to the By-laws."

Q. 94. Now, Father Hilary, I call your attention to Section 10 of the by-laws by which it is provided, "To become and to be a member of this Corporation it is absolutely necessary: 1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

2. To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church." These by-laws were in operation, were they not, at the time Father Wirth joined the order in New Jersey, May, 1887?

A. They were in force.

Q. 95. As Abbot of your order, of your chapter of St. Mary's in New Jersey, in May 1887, could you have received Augustin Wirth to membership if he had not been a member of the Order of
109 St. Benedict and had not made the vows described in these by-laws?

Mr. BURR: The defendant objects to that as incompetent, irrelevant and immaterial.

A. If he had not been a priest he could not have been received into the order of St. Benedict.

Q. 96. I further call your attention to subdivision of Section XII of the by-laws, "And, moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey." Was that provision in force when Father Wirth joined the order in 1887?

Mr. BURR: I object to it as incompetent and irrelevant.

A. Yes.

Q. 97. Now, Father Hilary, in accordance with these vows in these by-laws, was it always necessary for every member of the Order of St. Benedict of New Jersey, that is, of the chapter of which you were the Abbot, to account for all moneys received by him to the chapter?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial, as calling for the conclusion of the witness and not the best of evidence.

A. Yes.

Q. 98. That is, in every instance, whenever any member of the order became in possession of any moneys he was always accountable to the Order of St. Benedict in New Jersey for those moneys?

Mr. BURR: Objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q. 99. As a matter of fact, was Father Wirth at various times during his membership of the Order of St. Benedict in New Jersey assigned to the charge of churches in towns outside of Newark—for instance, was he assigned to a church in Elizabeth, New Jersey?

A. Yes.

Q. 100. Did he receive from the congregation of that church a fixed salary?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial.

A. Yes.

Q. 101. Did he invariably account to the Abbey of which you were the Abbot for that salary?

110 Mr. BURR: I object to that as incompetent, irrelevant and immaterial and not the best of evidence.

A. Yes.

Q. 102. When a person became a member of the Order of St. Benedict and took the vows, did the Order agree on its part to maintain and support him for life, in sickness and in health?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best of evidence.

A. Yes.

Q. 103. In Father Wirth's case, did the Order, as a matter of fact, take care of him during sickness?

Mr. BURR: Objected to as incompetent, irrelevant and immaterial.

A. Yes.

Q. 104. Do you recall any particular time when Father Wirth was sick at which time he was taken care of by the members of the order?

Mr. BURR: I object to that as immaterial.

A. Yes.

Q. 105. Will you state when that was and for how long?

A. Well, I couldn't do that from memory. He suffered a great deal from rheumatism and swollen knees and he had to go to the hospital at one time for an operation. He spent two years at Abbey away from the congregation at Elizabeth when he was not feeling so well.

Q. 106. And during that time was he taken care of?

A. Yes, he had some such rest.

Q. 107. Although at that time he was not able to perform the duties of a member of the order; is that correct?

A. Well, no, I wouldn't say that, but he was not strong enough to keep on with his work in the parish.

Q. 108. He couldn't do outside active work at that time?

A. And we had to send help Saturdays and Sundays to help him at Elizabeth.

Q. 109. Now, Father Hilary, was it by your permission that Father Wirth was sent to Springfield, Minnesota, to take care of a church there?

Mr. BURR: I object to that as immaterial and irrelevant.

A. Yes.

Q. 110. Did he ever transfer his stability from the Abbey of St. Mary's in New Jersey to any other abbey?

Mr. BURR: I object to that as immaterial.

111 A. No.

Q. 111. Will you state what happened at the time he became ill in Minnesota; at the time that you were advised that he became ill in Minnesota, what did you do?

Mr. BURR: The defendant objects on the ground that it is irrelevant and immaterial.

A. His sickness was a sudden one, he had pneumonia and I was informed by telegraph.

Q. 112. You were informed by telegraph?

A. I think it was telegraph, yes.

Q. 113. And what did you do then?

A. Being so far away I gave charge of the whole thing to the Abbot of St. John's, Minnesota.

Q. 114. With what instructions?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial and not the best evidence.

Q. 115. Did you give any instructions as to the care——

A. Yes, to care for him.

Q. 116. What were those instructions?

Mr. BURR: Were those instructions in writing?

The WITNESS: Yes.

Mr. BURR: The defendant objects on the ground that it is incompetent, irrelevant and immaterial and not the best evidence.

A. Well, I gave charge of all the affairs of Father Augustin to the Abbot Peter Engel of St. John's Abbey, Minnesota, to see after all his affairs the same as I would if I were present.

Q. 117. What did Father Engel do?

Mr. BURR: I object to that as incompetent, irrelevant and immaterial and not the best evidence.

A. He took charge of his effects, his writings and also the money matters, the funeral.

Mr. BURR: I move to strike out the answer of the witness on the ground that it is apparent that he is testifying from hearsay.

Q. 118. Did he pay the funeral expenses?

Mr. BURR: I object to the question as incompetent, irrelevant and immaterial and as not shown to have been within the witness' personal knowledge.

112 A. Yes.

Q. 119. I show you a paper, a receipt signed by George Ross. Will you tell me what that is; do you know what that paper is?

A. Yes.

Q. 120. What is it?

A. It is the receipt of what moneys he paid for expenses, the funeral and doctor?

Q. 121. Father Engel?

A. Yes.

Q. 122. How did you get it?

A. He sent it to me.

Q. 123. That was sent to you?

A. Yes.

Q. 124. And the purpose was when it was sent to you—did you remit for this to Father Engel?

Mr. BURR: I object to that is immaterial.

A. It was moneys paid; these bills were paid out of moneys which were in Father Augustin's possession after he died.

Q. 125. Did Father Engel account to you then?

A. Yes.

Q. 126. For those moneys which were found in Father Wirth's possession after he died?

A. Yes.

Mr. GLADDEN: I offer that in evidence.

Mr. BURR: I object to it as incompetent, irrelevant and immaterial and because no proper foundation has been laid for its introduction.

(The receipt is marked Complainants' Exhibit 8, February 16th, 1909, J. A. S., Ex'r.)

Complainants' Exhibit 8 reads as follows:

"COLLEGEVILLE, MINN., *Jan.* 24, 1902.

"Received from Peter Engel One Hundred and Eighty-six 89/100 Dollars in full of expenses, funeral, &c. a/c of Rev. Augustin Wirth.
"$186.89/100.

"GEO. ROSS."

Q. 127. Do you know his writing?
A. Yes.
Q. 128. Is this Peter Engel's writing? (Handing paper to witness.)
A. Yes, you will find more there on the itemized bills.
Q. 129. You are familiar with the handwriting of the Father?
A. Yes.
Q. 130. Is this in his handwriting? (Handing witness paper.)
A. That is his handwriting.

113 Mr. GLADDEN: I offer that in evidence.
(Marked Complainants' Exhibit 9, February 16th, 1909, J. A. S., Ex'r.)
Complainant's Exhibit 9 reads as follows:

"Statement of account with Abbot Hilary, O. S. B.

"Cr.

"Cash rec'd a/c intt. Apr. 28/03		$ 70.88
"Cash rec'd a/c int. Sept. 8/03		209.00
		279.88

"Dr.

"Cash sent to Anselmianum Mar. 14/03	$165.00	
"Cash for trip to Mankato July 19/03	3.00	
		168.00
		$111.88

"Nov. 7, 1903.

"PETER ENGEL, *O. S. B., Abbot.*"

Q. 131. Now, Father Hilary, in regard to the books which Father Wirth wrote: Did he do considerable work upon those books while he was a member of the Abbey?

Mr. BURR: I object to that as immaterial.

Q. 132. Was he employed in working on those books while he was a member of the Abbey in New Jersey at various times?
A. Yes.
Q. 133. And for a considerable time?
A. Yes.
Q. 134. As a matter of fact, were the books boxed and shipped from the Abbey; that is, prepared for shipment or delivery at the Abbey?

Mr. BURR: I object to that as immaterial and irrelevant.

A. Part of the time; you have it there, below there, I think the time he spent at the Abbey. (Indicating paper.)

Q. 135. And in the publication and the sale of the books and the distribution of them was he assisted by members of the order?

Mr. BURR: I object to that as irrelevant and immaterial.

114 A. Yes.

Q. 136. Did Father Wirth leave any debts or unsatisfied demands against him at the time of his death that had not been paid?

Mr. BURR: I object to that unless it is shown that the witness has some knowledge of the fact.

Q. 137. That have since been paid?

A. He had some bills to pay when he died, but that accounting there shows.

Q. 138. Have you paid all the claims against his estate that have been presented?

A. Yes.

Q. 139. And of which you have any knowledge?

A. Yes.

Q. 140. Father Hilary, will the Order of St. Benedict, a corporation, receive a greater amount of principal or income of personal real estate than is permitted by the laws of the State of New Jersey in case it receives the property which is sued for in this bill of complaint?

Mr. BURR: The defendant objects to that question on the ground that it calls for a conclusion of the witness.

A. No.

Q. 141. The order is not now in receipt of more than $3,000 a year from its real estate, is it, Father?

A. No.

Q. 142. Have you demanded from Benziger Brothers the moneys which are the proceeds of the sale of the books since Father Wirth's death and which are accruing from time to time—I mean, a formal demand?

Mr. BURR: Objected to as immaterial.

A. Now or formerly?

Q. 143. Formerly.

A. Since his death we have; that is, not always, there is some of it in the holding of Benziger Brothers.

(Examination suspended for the purpose of cross-examination.)

Cross-examination.

By Mr. BURR:

X Q. 144. Father Hilary, when did you first become a member of the corporation known as the Order of St. Benedict of New Jersey?

A. From the day I became its Abbot, and that was in November, 1886.

X Q. 145. Prior to that time were you engaged in religious work?

A. Yes.

115 X Q. 146. Stationed where?

A. I was at the Abbey of St. Vincent, Westmoreland County, Pennsylvania.

X Q. 147. That is at what town in Pennsylvania?

A. It is in the country, it is some two and a half or three miles from the town of Latrobe.

X Q. 148. And when were you first stationed at St. Vincent's?

A. I came here as a boy in 1853, ten years of age.

X Q. 149. And remained there from 1853 to 1866?

A. 1886, excepting four years in Rome.

X Q. 150. What four years?

A. From 1866 to 1870.

X Q. 151. Where were you in August, 1852?

A. I was at home, nine years old.

X Q. 152. And where was your home at that time?

A. It was in Latrobe.

X Q. 153. In August, 1852, did you know Augustin Wirth?

A. No.

X Q. 154. In August, 1852, then, of course, you didn't know his handwriting?

A. No.

X Q. 155. And therefore you were not present when you claim that Augustin Wirth joined the Order of St. Benedict and made the vows which is Complainants' Exhibit 2?

A. No.

X Q. 156. You say you are acquainted with the handwriting of the late Father Wirth?

A. Yes.

X Q. 157. About when did you become acquainted with that handwriting?

A. I can hardly say that I did before he joined the order in May, 1887.

X Q. 158. You became acquainted with it at or about that time?

A. Yes.

X Q. 159. What had been your acquaintance with Father Wirth prior to May, 1887?

A. I knew him as a priest and exercising priestly functions, preaching and the like.

X Q. 160. Where was he?

A. For a time at St. Vincent's but for a greater part of the time in Greenburgh, Pennsylvania.

X Q. 161. How far from St. Vincent's?

A. Between eight and nine miles.

X Q. 162. Was there any personal or social intimacy between you and Father Wirth during the time prior to May, 1887?

A. Oh, yes, we were students; we used to have walks and the like,

and we would come to Greenburg to be treated to a lunch or something like that.

X Q. 163. What was the difference in your ages?

116 A. He was born in 1828 and I was born in 1843.

X Q. 164. There was fifteen years' difference in your ages?

A. Yes.

X Q. 165. When did you first see the original, the Latin, of Complainant's Exhibit 2, which I now hand you?

A. The first time I saw that was when they sent it to me from the archives of St. Vincent's and that is not so long ago, that is about a year ago.

X Q. 166. That is since the institution of this litigation?

A. Yes.

X Q. 167. And how did you come to get this Exhibit 2 into your possession?

A. I requested them to send it by writing to them.

X Q. 168. You wrote to whom?

A. To the Archabbot, to the Superior of St. Vincent's Archabbey, to the Archabbot.

Q. 169. Requesting what?

A. Asking him to send me that paper to show that Brother Augustin made solemn vows.

X Q. 170. And this is what you received?

A. That is what I received.

X Q. 171. In answer to your request?

A. Yes.

X Q. 172. And that is all you know about this document, is it?

A. That is all I know about it personally.

Mr. Burr: At this point the defendant moves to strike from the record Complainants' Exhibit No. 2 on the ground that it has not been properly identified, established or proven that it is the document which complainants claim it to be, on the ground that no proper foundation has been laid for its introduction in evidence and because it is incompetent.

X Q. 173. Father, somewhat aside from this controversy but referring to a statement which you made upon your original examination, do you seriously assert and contend that the Order of St. Benedict civilized Europe?

A. Yes.

X Q. 174. You believe the civilization of Europe is due to the Order of St. Benedict and to its labors and efforts?

A. Yes.

X Q. 175. They have been disappearing in modern times, have they not?

A. Yes, compared with former times, so many orders have sprung up. The Benedictines were the only monks of the west in other days, up to the Twelfth or Thirteenth Century, and afterwards the other ones, the Jesuits, the Dominicans and the Franciscans and a number of other orders came in, too.

X Q. 176. Community life is not so prevalent now as it was some centuries ago.

117 A. Not as prevalent as it was in the Middle Ages.

X Q. 177. There has been a tendency and a trend in the other direction?

A. Yes, especially in modern times.

X Q. 178. It doesn't seem to accord with the so-called modern ideas?

Mr. GLADDEN: I object to that.

X Q. 179. Is that not true?

A. Well, to a great extent; times change and people with them.

X Q. 180. Ideas, notions and public policy?

Mr. GLADDEN: I object to all this as being absolutely irrelevant.

A. Yes.

X Q. 181. But as I understand you, the rules and regulations, the vows and professions of the Order of St. Benedict have never changed since the Sixth Century?

A. Never; not as to the essentials; they have been modified as to dieting, for instance, because of cold regions and because of infirmities creeping in more and more he has allowed the eating of flesh, meat and modifications have taken place like that, but his rule has never been changed.

X Q. 182. Let us return to St. Vincent's. At what period did you complete your schooling there?

A. Three years before I was ordained; I was ordained—no, when I was ordained, I was ordained in 1866, in May, after completing my studies.

X Q. 183. And then you went to Rome?

A. Yes.

X Q. 184. For four years?

A. Yes.

X Q. 185. Were you then a member of the Order of St. Benedict?

A. I went away as such and came back as such.

X Q. 186. You became a member of the Order of St. Benedict before you were ordained?

A. No, before I went to Rome.

X Q. 187. Oh, after your ordination and before you went to Rome?

A. Yes.

X Q. 188. Where was Augustin Wirth at that time?

A. I think he went to Kansas at that time, about; there is a letter from St. Vincent's (Indicating paper.)

X Q. 189. After having refreshed your recollection from your data, can you tell me where Augustin Wirth was from 1853 to 1857?

A. He was in Greenburgh, Pennsylvania.

X Q. 190. Where he had a church?

A. Yes, charge of one.

118 X Q. 191. As what?

A. As rector or pastor.

X Q. 192. Being paid a compensation?
A. Yes.
X Q. 193. Then he left Greenburgh about 1857?
A. Yes.
X Q. 194. Going where?
A. To Kansas; that is, to establish a college and to build a church in Kansas; the church afterwards became an abbey.
X Q. 196. How long did he remain in Kansas?
A. He must have been there ten or eleven years, from 1857 to 1868.
X Q. 196. In charge of a church and college there?
A. He built a church.
X Q. 197. Established a Catholic church.
A. Yes, and that school and college.
X Q. 198. During this period was he paid for his services?
A. The students, I suppose they had to pay, I suppose something.
X Q. 199. Then he remained in Kansas about twelve years; that is correct, is it not, about that?
A. About that, yes.
X Q. 200. That brings us to 1869. Where was he for the next period after that?
A. I couldn't say for certain; I haven't any certain recollection about that; he went as a member of the Order of St. Benedict to Kansas and then he went to Elizabeth, New Jersey—no, no, he was, I think, a member of St. Vincent's.
X Q. 201. Went back to St. Vincent's?
A. I think he was as a member of St. Vincent's in the first years at Elizabeth—no, he wasn't.
X Q. 202. Well, from Kansas do you know where he went to?
A. He came to us; that is, as a member of the Order of St. Benedict.
X Q. 203. No, not membership. Where did he personally go to, to Elizabeth, New Jersey?
A. That was his first place, in New Jersey, Elizabeth.
X Q. 204. And about when did he go there.
A. That was some years before he joined us.
X Q 205. About how many years before 1887?
A. It was 1880.
X Q. 206. He had charge of a church or parish there?
A. Yes.
X Q. 207. Receiving compensation for his services?
A. Yes.
X Q. 208. Then you said he joined your order by making this transfer?
A. Transfer, yes.
X Q. 209. From 1887 on till where he was and what work he did?
119 A. He was with us; that is, he was in charge of the church at Elizabeth excepting two years that he spent at the

Abbey and five months and a half in Wilmington, Delaware. We have also a congregation or church there.

X Q. 210. When did he go to Minnesota?

A. That was in 1897, in the fall of 1897.

X Q. 211. Then from 1887 to 1897, with the exception of two years which he spent with you, he was engaged in work, in charge of various parishes or churches?

A. Only when he was in Elizabeth excepting the five and a half months in Wilmington, Delaware.

X Q. 212. Then he was in Elizabeth for seven and a half years?

A. Oh, it was longer than that.

X Q. 213. He was in Elizabeth about seven and a half years after he transferred himself into your order?

A. You see when he joined us he was already in charge of that church in Elizabeth.

X Q. 214. Yes, and he continued for about seven and a half years?

A. Except the two years that he was in the Abbey and the half year in Wilmington, Delaware; he left for Minnesota.

X Q. 215. Have you a record of the date when he left for Minnesota?

A. Not the exact date, but I think the letter is there. He went to Minnesota through the bishop of Newark, at that time Bishop Wigger. He had written to St. Paul, to Archbishop Ireland of St. Paul, who had a German congregation there and who was in want of German priests, and so it was that he asked the Archbishop whether he would take him if he came and if he got permission and I gave him the permission.

X Q. 216. Can you inform me, say, the month and the year when Augustin Wirth went to Minnesota?

A. Well, it was about the close of September I guess, or October—it was in the fall.

X Q. 217. It was after July, was it?

A. Yes.

X Q. 218. And he remained in Minnesota from 1897, the fall of 1897 until his death?

A. Yes.

X Q. 219. Well, to correct any error in dates, will you ascertain so we may have it at the next hearing whether Augustin Wirth went to Minnesota in the fall of 1897 or the fall of 1898?

A. It was in 1897, it was in the fall about, because he spent two months in Rome, July and August, and he traveled also around to see different monasteries. He was not felling well at the time, he was sickly at the time.

120 X Q. 220. During what period did he travel around for his health?

A. He went to Rome in July and he came back about the end of August and then he traveled, visited some monasteries, and he wanted to be free of work. He was a pretty sick man at the time, and then there came the permission of Archbishop Ireland to take him for service out in Minnesota.

X Q. 221. And from the fall of 1897 to the date of his death,

which was in December, 1901, he was in Springfield, Minnesota, in charge of this congregation.

A. Yes.

X Q. 222. Receiving compensation for his services?

A. Yes.

X Q. 223. Have the by-laws or constitution of the Order of St. Benedict of New Jersey ever been amended?

A. No.

X Q. 224. When you returned from Rome, Father Hilary, that was in 1870?

A. Yes.

X Q. 225. You went back to St. Vincent's?

A. Yes.

X Q. 226. Did you then become officially connected with the order there in a capacity other than a member?

A. I taught there for a number of years and I was vice-president and director of the college there for nearly fourteen years.

X Q. 227. I show you Complainant's Exhibit No. 7, the constitution and by-laws of the Order of St. Benedict of New Jersey, and ask you to explain the lead pencil changes and markings on the face of that exhibit?

A. That is a change; when these by-laws were made Newark was not an Abbey, and the Abbey of Newark then belonged to the jurisdiction of the archabbey of St. Vincent's Boniface Wimmer.

X Q. 228. Is that the only change?

A. Yes, the only one I know of.

X Q. 229. If they had been changed in any other particular you would know it?

A. Yes; that had to be changed because the abbeys were changed. I have it here Augustine was sent to Springfield, Minnesota, in the Archdiocese of St. Paul in the fall of 1897.

X Q. 230. Who is the financial officer of the Order of St. Benedict of New Jersey?

A. Properly it is the Abbot.

X Q. 231. Who occupies the position corresponding with that of treasurer of a lay corporation?

A. It is the Abbot.

X Q. 232. And you are the Abbot?

121 A. Yes.

X Q. 233. You occupy the positions, then, practically of president and treasurer of this corporation?

A. Yes. I think we have a treasurer for the college and we have what we call one that takes care of the table and the like and looks after what is necessary for the house, but what he does must always be with the permission and knowledge of the Abbot.

X Q. 234. Well, do you keep the books of the order in New Jersey?

A. No.

X Q. 235. Who does?

A. That is the Prior who is at the same time the Procurator.

X Q. 236. He occupies the position like secretary?

A. Yes.

X Q. 237. Does he keep these books under your direction?
A. Yes.
X Q. 238. And who is this Prior now?
A. Brother Ernest Helmstetter.
X Q. 239. The gentleman in the room with us?
A. No.
X Q. 240. Have you the books of the Order of St. Benedict of New Jersey with you?
A. One I have.
X Q. 241. What book have you here?
A. There is one prior to the one that we have here, but I thought that so far as Brother Augustin's accounts were concerned, why, they were in this book. There is nothing in the other book because it is too far back.
X Q. 242. Let me understand, this book that you have presented here, is a general account book of the order?
A. Yes, the ledger.
X Q. 243. Can you tell me what period of time is covered by the transactions in this book which I hand you?
A. Concerning whom?
X Q. 244. The financial transactions of the Order of St. Benedict of New Jersey by an examination of the book?
A. From about 1883 to 1895.
X Q. 245. You are familiar with the writings of Augustin Wirth?
A. To confess the truth, I haven't read them all that he translated. His works were not compositions, his works consisted in translations from other languages, excepting the sermons, which are some his and others are those that he got by asking for them from priests.
X Q. 246. And when did you first learn that he was engaged in the work of translating for publication?
A. Not before I came to Newark.
X Q. 247. Not before he came to Newark?
A. Yes, when I came to Newark.
122 X Q. 248. About 1887?
A. Yes.
X Q. 249. And then you learned that he was publishing books?
A. Yes.
X Q. 250. Before 1887 didn't you know of his writings or his books?
A. I can't recollect. I think that was about the time that he began to work in earnest in translating, and so forth.

Further hearing adjourned to Friday, February 19th, 1909, at 10 o'clock a. m., at the Public Administrator's office, 119 Nassau Street.

Stipulation.

In the Circuit Court of the United States, in and for the Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of AUGUSTIN WIRTH, Defendant.

Stipulation.

MARCH 29, 1909.

It is hereby stipulated and agreed, by and between the parties to this action that the complainants, under the firm name and style of Benziger Brothers, first began the transaction of business with Augustin Wirth, deceased, prior to the year 1884, and that from the date of the commencement of such business until about July 23, 1897, the complainants purchased of said Augustin Wirth and said Wirth sold to complainants in the usual ordinary course of business and trade certain of his books and publications at certain prices then, or from time to time agreed upon, and that during such period the complainants paid to said Wirth such sums of money as they became indebted to him for on account of such business, and that said payments were made, generally, if not always, by checks and that among the checks so given by said complainants to said Wirth and afterwards by said complainants paid through the banks upon which they were drawn by complainants are the following:

1. Check dated New York, August 11, 1884, drawn upon the National Park Bank for the sum of $60 to the order of Rev. Augustine Wirth, endorsed, "Augustine Wirth, pay National Park Bank or order for account of National State Bank, Elizabeth, N. J."

2. Check dated New York, December 16, 1884, drawn upon the same bank for $106.04, payable to the order of Rev. P. (meaning Pater) Aug. Wirth, endorsed same as check number 1.

123 3. Check dated New York, January 14, 1884, drawn on the same bank for $143.34, payable to the order of Rev. P. Aug. Wirth, O. S. B., endorsed same as checks number- 1 and 2.

4. Check dated New York, October 25, 1886, drawn upon the same bank for $1.80, payable to the order of Rev. P. Aug. Wirth, O. S. B., and endorsed the same as checks number- 1, 2 and 3.

5. Check dated New York, January 20, 1887, drawn upon the same bank for $74.32, payable to the order of Rev. Aug. Wirth, O. S. B., endorsed "Rev. Augustine Wirth, O. S. B."

6. Check dated New York, January 14, 1889, drawn upon the same bank for $38.82, payable to the order of Rev. Augustine Wirth, O. S. B., endorsed "Pay Herman Bartsch, Augustine Wirth, O. S. B."

7. Check dated New York, January 3, 1891, drawn upon the same bank for $38.68, payable to Very Rev. Aug. Wirth, O. S. B., endorsed "Pay C. Von Dannenborg & Co., Augustine Wirth."

8. Check dated New York, August 13, 1891, drawn upon the same bank, for $32.06, payable to the order of Vy. Rev. Aug. Wirth, O. S. B., endorsed "Augustine Wirth, for collection and credit account of First National Bank of Elizabeth, New Jersey."

9. Check dated New York, November 12, 1891, drawn upon the same bank for $60.50, payable to the order of Rev. Augustine Wirth, O. S. B., and endorsed "Augustine Wirth, O. S. B."

10. Check dated New York, December 9, 1891, drawn upon the same bank for $12.00, payable to the order of Rev. Augustine Wirth, O. S. B., endorsed "Augustine Wirth."

11. Check dated New York, February 11, 1892, drawn upon the same bank for $28.92, payable to V. Rev. Aug. Wirth, O. S. B., endorsed "Pay Miss E. C. Donnelly, Augustine Wirth, O. S. B."

12. Check dated New York, May 9, 1892, drawn upon the same bank for $246.43, payable to the order of Vy. Rev. Aug. Wirth, O. S. B., endorsed "Augustine Wirth."

13. Check dated New York, October 10, 1894, drawn upon the same bank for $14.40, payable to the order of Rev. Augustine Wirth, O. S. B., endorsed "Augustine Wirth, Cook and Hall."

124 14. Check dated New York, May 13, 1896, drawn upon the same bank for $116.36, payable to the order of Rev. Aug. Wirth, O. S. B., endorsed "Augustine Wirth."

15. Check dated New York, February 15, 1896, drawn upon the same bank for $50.27, payable to the order of Rev. Augustine Wirth, O. S. B., and endorsed "Augustine Wirth."

16. Check dated New York, August 12, 1896, drawn upon the same bank for $23.40, payable to the order of Rev. Aug. Wirth, O. S. B., and endorsed "Augustine Wirth, O. S. B."

That prior to the 23rd day of July, 1897, no written contract existed between Benziger Brothers and Augustin Wirth.

That after the execution of the contract between Benziger Brothers and Augustin Wirth introduced in evidence and dated July 23, 1897, and until the date of the last payment due from Benziger Brothers to Wirth prior to his death, the said Benziger Brothers, the complainants, paid to said Wirth the various sums of money set up in the complaint and that said payments were represented by the following checks, among others, drawn upon the National Park Bank of the City of New York.

17. Check dated New York, October 9, 1897, for $98.16, payable to the order of Rev. Augustine Wirth, O. S. B., and endorsed "Augustine Wirth."

18. Check dated New York, November 1, 1897, for $250, payable to the order of Rev. Augustine Wirth, and endorsed "Pay to Rt. Rev. W. M. Wigger, D. D., Rev. Aug. Wirth. Pay to Rev. Ambrose Huebner, Treasurer, Rt. Rev. W. M. Wigger, D. D. Pay to the order of the First National Bank (Elizabeth, N. J.), Rev. Ambrose Huebner, Treasurer."

19. Check dated New York, April 7, 1898, for $682.27, payable to the order of Rev. Augustine Wirth, O. S. B., for $682.27, endorsed "Augustine Wirth, pay Importers and Traders National Bank, New York, N. Y., or order, National Citizens' Bank, Mankato, Minn."

20. Check dated New York, July 14, 1898, for $106.86, payable to Rev. Augustine Wirth, O. S. B., and endorsed "Rev. Augustine Wirth."

21. Check dated New York, April 15, 1899, for $253.03, payable to the order of Rev. Augustine Wirth, O. S. B., and endorsed "Rev. Augustine Wirth, O. S. B., and pay to the order of any bank or banker, State Bank of Springfield, Springfield, Minnesota."

125 22. Check dated New York, April 22, 1899, for $14.25, payable to the order of Rev. Aug. Wirth, O. S. B., and endorsed "Rev. Augustine Wirth, O. S. B."

23. Check dated New York, January 24, 1899 for $299.67, payable to the order of Rev. Augustine Wirth, O. S. B., and endorsed "Rev. Augustine Wirth, O. S. B."

24. Check dated New York, July 21, 1899, for $152.15, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

25. Check dated New York, October 9, 1899, for $155.30, payable to the order of Rev. Augustine Wirth, and endorsed "Rev. Augustine Wirth."

26. Check dated New York, January 16, 1900, for $240, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

27. Check dated New York, April 9, 1900, for $281.34, payable to the order of Rev. Augustine Wirth, and endorsed "(Rev.) Augustine Wirth."

28. Check dated New York, July 13, 1900, for $265.30, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

29. Check dated New York, October 9, 1900, for $175, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

30. Check dated New York, January 24, 1901, for $109.45, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

31. Check dated New York, April 18, 1901, for $334.55, payable to the order of Rev. Augustine Wirth, and endorsed in a different handwriting "Rev. Augustine Wirth, pay to the National Park Bank of New York or order, Benziger Brothers"

32. Check dated New York, September 3, 1901, for $237.90, payable to the order of Rev. Augustine Wirth, and endorsed "Augustine Wirth."

33. Check dated New York, October 23, 1901, for $298.70, payable to the order of Rev. Augustine Wirth, and endorsed "Rev. Augustine Wirth."

That since the date of the last payment to Augustine Wirth in his lifetime, October 23, 1901, and up to and until the — day of —, 1907, the complainants have paid to Rev. Hilary Pfraengle,

126 by virtue of the contract between complainants and Augustin Wirth, dated July 23, 1897, the sums of money set forth in the exhibit annexed to the complainants' testimony and marked "Complainants' Exhibit —" and that said payments, or most of

them, have been made by checks drawn upon the National Park Bank of the City of New York, as follows:

34. Check dated New York, January 26, 1905, for $168.10, payable to the order of Rt. Rev. Hilary Pfraengle, O. S. B., D. D., and endorsed Hilary Pfraengle, O. S. B., Hilary Pfraengle, P. E., pay National Bank of Commerce in New York, or order, Union National Bank, Newark, N. J."

35. Check dated New York, April 19, 1905, for $224.28, payable to the order of Rt. Rev. Hilary Pfraengle, O. S. B., and endorsed "Hilary Pfraengle, O. S. B., Hilary Pfraengle, P. E."

36. Check dated New York, July 26, 1905, for $112.45, payable to the order of Rt. Rev. Hilary Pfraengle, O. S. B., D. D., and endorsed "Hilary Pfraengle, P. E."

37. Check dated New York, October 28, 1905, for $200, payable to the order of Rt. Rev. Abbot Hilary Pfraengle, O. S. B., and endorsed "Hilary Pfraengle, P. E."

38. Check dated New York, January 22, 1906, for $156.45, payable to the order of Rt. Rev. Hilary Pfraengle, O. S. B., and endorsed "Hilary Pfraengle, P. E."

39. Check dated New York, April 13, 1906, for $175.95, payable to the order of Rt. Rev. Abbot Hilary Pfraengle, O. S. B., and endorsed "Rt. Rev. Hilary Pfraengle, O. S. B."

40. Check dated New York, July 14, 1906, for $158.10, payable to the order of Rt. Rev. Hilary Pfraengle, D. D., and endorsed "Hilary Pfraengle, P. E."

41. Check dated New York, October 17, 1906, for $153.45, payable to the order of Right Rev. Hilary Pfraengle, O. S. B., D. D., and endorsed "Hilary Pfraengle."

42. Check dated New York, January 22, 1907, for $200, payable to the order of Rt. Rev. Hilary Pfraengle, O. S. B., D. D., and endorsed "Hilary Pfraengle, O. S. B."

That May 1, 1907, a check upon the same bank, payable to the Order of the Benedictine Fathers for $260 was sent to Rev. Hilary Pfraengle and on or about said date was returned to complainants and upon the statement, Exhibit —, there appears first the charge of this check under date of May 1st $260, and later and on the 7th day of May, 1907, the credit "By check returned, $260."

127 That said check is endorsed "Benedictine Fathers. Pay to the National Park Bank of New York, or order. Benziger Brothers."

That among the books bought by the complainants from Augustine Wirth prior to July 23, 1897, and re-sold by complainants in the regular course of their business, were the following:

1. New and Old Sermons, eight volumes, the title page of which is as follows:

"New and Old Sermons.

A monthly repertory of Catholic Pulpit Eloquence,
Embracing
Two Sermons for Each Sunday,
and
Holyday of Obligation
of the Ecclesiastical Year.

(In conjunction with many other Clergymen)
by
Rev. Augustine Wirth, O. S. B., Elizabeth, New Jersey.

Vol. —, — Edition.

Published by
Rev. Augustine Wirth, O. S. B.,
Elizabeth, N. J."

That on the reverse side of the title page appears the following:

Copyrighted by
Rev. Augustine Wirth, O. S. B.
Printed by
Cook and Hall, Elizabeth, N. J."

That one of said volumes, to-wit, Volume 5, has upon the reverse side of the title page the following:

"Copyrighted 1891
by
Rev. Augustine Wirth, O. S. B."

That some of the original copies of the books last mentioned are still in the possession of the complainants.

2. Thoughts and Counsels for the Consideration of Catholic Young Men, the title page of which is as follows:

"Thoughts and Counsels
for the Consideration of
Catholic Young men.
by
Rev. V. A. Von Doss, S. J.

128 Freely Translated and Adapted
by
Rev. Augustine Wirth, O. S. B.
Fifth Edition.

Rev. Augustine Wirth, O. S. B.
Elizabeth, N. J.
1889."

That on the reverse side of the title page appears the following:

Copyrighted 1882
by
Rev. Augustine Wirth, O. S. B."

That some of the original copies of the books are still in the possession of the complainants.

3. Funeral Sermons, the title page of which is as follows: (Two Volumes.)

"Funeral Sermons
by
Rev. Augustine Wirth, O. S. B.
Vol. —, — Edition.

Elizabeth, N. J.
Published by Rev. Augustine Wirth O. S. B.

That on the reverse side of the title page appears the following:

"Copyrighted 1889
by
Rev. Augustine Wirth, O. S. B."

That some of the original copies of the books last mentioned are still in the possession of the complainants.

4. New May Devotions, the title page of which is as follows:

"New May Devotions.
Practical Reflections
On each of the Fifty-eight Invocations of the Litany of Loretto.
Edited by
Rev. Augustine Wirth, O. S. B.

— Revised and Improved Edition.
Elizabeth, N. J.

Published by Rev. Augustine Wirth, O. S. B."

That on the reverse side of the title page appears the following:

129 "Copyrighted
by
Rev. Augustine Wirth, O. S. B.
P. F. Breen, Printer,
61 Beekman St.
N. Y."

On the page following the one containing the words "Copyrighted by Augustine Wirth, O. S. B." are the following:

"NEWARK, N. J., *April* 1, 1882.

Dear Father Augustine Wirth, O. S. B.:

With great pleasure I give you permission to publish your New Month of Mary which I consider a very useful book. Its style is

plain and simple and adapted to the comprehension of the people. This could not be said of many "months of Mary" heretofore published. They seemed to have been written for theologians who could understand the abstruse subjects of which they treated; but for the general public they were almost useless.

Yours very sincerely,

+ W. M. WIGGER,
Bp. of Newark.
+ W. MICHAEL,
Epus Novarcensis.

Imprimatur.
(L. S.)"

That some of the original copies of the books last mentioned are still in the possession of the complainants.

5. Two Spiritual Retreats for Sisters, the title page of which is as follows:

"Two Spiritual Retreats
For Sisters.
By the Rev. Ev. Zollner.

Translated and adapted with the permission of the author
By Rev. Augustine Wirth, O. S. B.
— Revised Edition.
Fr. Pustet.

Printer to the Holy See and the S Congregation of Rites.
Fr. Pustet & Co.,
New York & Cincinnati.
1889."

130 That on the reverse side of the title page appears the following:

"Copyrighted 1889.
E. Steinback of the firm of Fr. Pustet & Co."

That some of the original copies of the book last mentioned are still in the possession of the complainants.

6. Lenten Sermons on the title page of which is the following:

"Lenten Sermons
Edited by
Rev. Augustine Wirth, O. S. B.,
Elizabeth, N. J."

That on the reverse side of the title page appears the following:

"Copyrighted 1891
by
Rev. Augustine Wirth, O. S. B."

That some of the original copies of the book last mentioned are still in the possession of the complainants.

7. Hunolt's Short Sermons the title page of which is as follows: (Five Volumes.)

"Short Sermons
For All the Sundays of the Year
by
Rev. Francis Hunolt, S. J.
by
Rev. Augustine Wirth, O. S. B.
Volume I.
The Bad Christian.
Published by
Rev. Augustine Wirth, O. S. B.,
Elizabeth, N. J."

That on the reverse side of the title page appears the following:

"Copyrighted 1896
by
Rev. Augustine Wirth, O. S. B."

That the title page and the reverse side thereof of Volume II is identical with the exception that the title of the book is "The Penitent Christian."

That the title page and the reverse side thereof of Volume III is identical with the exception that the title of the book is "The Good Christian."

131 That the title page and the reverse side thereof of Volume IV is identical with the exception that the title of the book is "The Christian State of Life."

That the title page and the reverse side thereof of Volume V is identical with the exception that the title of the book is "The Christian's Past End."

That none of the original copies of the books last mentioned are still in the possession of the complainants.

8. The Confessional the title page of which is as follows:

"The
Confessional
by
Rt. Rev. Aloysius Roeggl, D. D.
Translated from the German, and adapted by Rev. Augustine Wirth, O. S. B.
— Edition.
Rev. Augustine Wirth, O. S. B.,
Elizabeth, N. J."

That on the reverse side of the title page appears the following:

"Entered according to Act of Congress in the year 1882 by Rev. Augustine Wirth, O. S. B.,
in the office of the Librarian of Congress, at Washington."

That some of the original copies of the book last mentioned are still in the possession of the complainants.

9. The Sacrament of Penance the title page of which is as follows:

"Seven Lenten Sermons
on
The Sacrament of Penance
Published by
Rev. Augustine Wirth, O. S. B.,
Elizabeth, N. J."

That upon the reverse side of the cover and also upon the next to the last page of this book appears the following

"Books
published by
Rev. Augustine Wirth, O. S. B.

1. The Pulpit Orator, 6 Vols., Sixth Edition..... $12.00
2. New May Devotions. Practical Reflections of the Invocations of the Litany of Loretto. 12mo. cloth, 500 pages, 7th Ed. 6,000 sold..... 1.00
132 3. The Confessional, containing the epistles and gospels for all Sundays and holydays and for many other festivals of the year together with a short sermon for early Mass on Sundays and the Holy Days and practical reflections and admonitions for the Confessional. 12mo. Cloth. 4th Edition, 3,000 sold..... 1.00
4. Eight Short Practical Sermons on Mixed Marriages, by Rev. A. A. Lambing, A. M. Paper. 3rd Edition, 2,000 sold..... .25
5. The Seven Last Words on the Cross. Seven Sermons. 3rd Edition..... .25
6. New and Old Sermons. Eight Vols. Large 8vo, 5th Ed. 3,000 sold..... 16.00
7. Two Retreats for Sisters. 2nd Edition..... 1.00
8. Thoughts and Counsels for the Consideration of Catholic Young Men. 12mo. 630 pages. Cloth. 3rd Edition. 2,500 sold..... 1.25
9. Lenten Sermons. 56 Sermons for Lent and the Passion-Tide. Seven sermons for each Lent, therefore sermons for eight years. Large 8vo..... 2.00
10. Funeral Sermons, 2 Vols..... 2.00
11. The Two-Edged Sword. Lenten Sermons..... .50
12. The Sacrament of Penance. Lenten Sermons..... .25

REV. AUGUSTINE WIRTH, O. S. B.,
Elizabeth, N. J."

That none of the original copies of the books last mentioned are still in the possession of the complainants.

10. The Two-Edged Sword, the title page of which is as follows:

"The Two-Edged Sword
Lenten Lectures
by
Rev. Augustine Wirth, O. S. B.
Published by
Rev. Augustine Wirth, O. S. B.
Elizabeth, N. J."

That some of the original copies of some of the books last mentioned are still in the possession of the complainants.

That on or about the 23rd day of May, 1897, said Augustine Wirth delivered to the complainants a stock of said books and the plates thereof, with the exception of the plates for Eight Short Practical Sermons on Mixed Marriages and the Seven Last Words on the Cross. That the complainants thereafter and from time to
133 time printed and re-printed said books, excepting the two last above mentioned, and that the only change made was in the title page by printing the number of the edition then being printed and the substitution of the publisher's name as follows:

"New York, Cincinnati, Chicago.
Benziger Brothers.
Printers to the Holy Apostolic See."

And in the case of Hunolt's Short Sermons the addition under the words "Copyrighted 1896, by Rev. Augustine Wirth, O. S. B., of the words "Copyrighted 1901 by Benziger Brothers."

That page 122 of Ledger No. 18B of the complainants has thereupon a ledger account with Augustine Wirth, from July 14, 1898, to January 24, 1899, and the title thereof is as follows:

Augustine Wirth, Springfield, Minn., Brown Co.

That pages 86, 87, 88 and 89 contain the account with said Augustine Wirth from September 30, 1897, to June 30, 1898, and that the caption or title of each of said pages is as follows:

"Rev. Augustine Wirth, O. S. B.,
Greenburg, Pa.
(Most Holy Sacrament Church)."

That page 123 of said Ledger is the ledger account with said Wirth from January 24, 1899, to July 21, 1899, and that the top or title of said ledger account is as follows: "Rev. Augustine Wirth, Springfield, Minn."

That pages 124 and 125, which contain the account down to January 8, 1901, have the same title or caption.

That page 121 of said book contains the same caption or title as pages 123, 124 and 125 and the account on said page 121 ends June 21, 1901.

That pages 101 and 102 or Ledger 19B contains an account with

Wirth from July 1, 1901, to July 30, 1902, and that the title or caption of each of said pages is as follows:

"Rev. Augustine Wirth, Springfield, Minn."

That pages 170, 171, 172, 173, 188, 189, contain an account of the sales of said Wirth's books from October 9, 1902, to June 30, 1907, and that the title or caption of said page is as follows:

134 "On sale a/c of Rev. Augustine Wirth's books. Checks payable to Rt. Rev. Abbot Hilary Pfraengle, D. D., 528 High Street, Newark, N. J."

That pages 210 and 211 of Ledger 20B contain an account of sales of said Wirth's books from July 1, 1907, to January 1, 1908, and that the title or caption of said pages is as follows:

"On sales account Rev. Augustine Wirth's books."

——— ———,
——— ———,
Solicitors for Complainants.

——— ———,
Solicitor for Defendant.

In the Circuit Court of the United States in and for the Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Defendant.

NEW YORK, *March* 29, 1909.

Examination of Nicholas C. Benziger on Behalf of Complainants, at the Office of Benziger Brothers, 36 Barclay Street, Borough of Manhattan, New York City.

Present:

Frank W. Arnold, Esq., for Complainants.
Charles L. Burr, Esq., for Defendant.

NICHOLAS C. BENZIGER, having heretofore been sworn, testified as follows:

By Mr. ARNOLD:

Q. Mr. Benziger, referring to check No. 2, of December 16, 1884, was that written by a German in your employ and if so, what does the word P. signify?

By Mr. BURR: I object to it as incompetent, immaterial, irrelevant, calling for the conclusion of the witness, it being also admitted on this objection that the check was not drawn by the witness.

A. P. stands for the Latin Pater and in Europe priests belonging to orders or convents are generally called Pater and then the first name, as for instance, Pater Augustine.

By Mr. BURR:

Q. Is it not a fact that in America all priests of the Catholic faith are commonly called Father?

A. They generally call them Father here.

135 By Mr. ARNOLD:

Q. Do they call them Reverend Father here?

A. They call them Father and then a second name. They would say Father Wirth. You cannot take this as an example because Father Wirth belonged to an order.

Q. Referring to the check of January 14, 1884 (No. 3), referred to in the above stipulation, by which it appears that in the body of the check after the words "Rev. P. Aug. Wirth," are the letters "O. S. B." State what those letters stand for.

By Mr. BURR: I object upon the ground that the witness upon his previous testimony has fully and at length explained his understanding of the letters O. S. B., and upon the further ground that it is incompetent, immaterial and irrelevant and that the question calls for the conclusion or understanding of the witness.

A. That says to what order he belongs—the Order of St. Benedict.

By Mr. BURR:

Q. In giving this answer do you mean or intend to in any way change or modify the testimony you have already given concerning your understanding of the meaning of the letters O. S. B.?

A. No, but I mean this is a more correct way. P. means that he belongs to an order and O. S. B. means what order according to European custom.

By Mr. ARNOLD:

Q. Referring to check No. 18 in the above stipulation November 1, 1897, do you know who the Rt. Rev. W. M. Wigger, D. D., is?

A. The Rt. Rev. W. M. Wigger was the Bishop, Bishop of Newark.

Q. Referring to check of July 21, 1899, and numbered 24, and the following checks set forth in the above stipulation down to and including October 23, 1901, number 33, state in whose handwriting the payee's name in those checks is?

A. All except one in the handwriting of the cashier, Mr. Bretcher, the exception being the check of October 9, 1890, number 29, in the handwriting of Mr. Bauer now in our employ.

By Mr. BURR:

Q. Can you tell me, Mr. Benziger, who signed the ten checks mentioned in the above stipulation beginning with the one dated July 21, 1899, number 24, and ending with the one dated October 23, 1901?

A. Some were signed by my partner, Louis C. Benziger, and some by myself.

136 By Mr. ARNOLD:

Q. I call your attention to the fact that the checks beginning with July 21, 1899, and numbered 24, and ending with the check dated October 23, 1901, and numbered 33 are drawn to the order of Rev. Augustine Wirth without the descriptive letters of O. S. B. Do you know the reasons why those letters were not added to the name of the payee in those checks?

A. I do not.

Q. Mr. Benziger, sometime about May 7th did you have a talk with Father Hilary Pfraengle in regard to retaining any of the amounts that might come into your hands in connection with the sale of Father Wirth's books?

A. No.

Q. Did you have any correspondence with him?

A. I think it went through you, Mr. Arnold.

Q. The payment of May 1st was the last payment that you made to Father Hilary?

A. That was the last payment.

Q. State, if you remember, why it was that the check you made that payment by on May 1st was returned to you by Father Hilary?

A. Because it was arranged that we keep all future money without paying it out and I think we arranged about paying an interest upon it.

Q. And his return to you of that check was had in pursuance of that arrangement?

A. Yes, because the arrangement was to be from January 1, 1907.

Q. Was the reason for this the pendency of this present suit and the claim made by you?

A. Mr. Arnold, if I remember correctly it was suggested by you.

Q. At that time the present suit was pending?

A. It was.

Q. And at that time you had had the claim made upon you by Mr. Steinhauser?

A. Yes.

BENZIGER
vs.
STEINHAUSER.

NEW YORK, *March* 30, 1909.

Met pursuant to adjournment.
Present: Counsel as before.

NICHOLAS C. BENZIGER, resumes the stand:

137 Cross-examination continued.

By Mr. BURR:

X Q. 130. Mr. Benziger, at the time you entered into this contract with Augustin Wirth, July 23, 1897, he delivered to you, did he not, a stock of books or publications mentioned in the contract?

A. He did

X Q. 131. At or about that time did you open a book account or record with each one of these books?

A. We did.

X Q. 132. And have you continued that book account or record with each volume from that day to the present?

A. We are continuing all the time.

X Q. 133. I show you book entitled "Books on sale," Benziger Brothers, calling your particular attention to pages 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69 and 70, and ask you if this book and those of said volumes and continue in account therewith down to the last or latest date shown upon each separate page?

A. Yes.

X Q. 134. And do you know this to be a true and correct record kept in the regular course of your business?

A. I do.

X Q. 135. And these records are continued in a latter book of the same title and found at pages 17 to 36, both inclusive?

A. Yes.

Mr. BURR: As a part of the cross-examination of this witness the defendant Steinhauser offers in evidence pages 47 to 70 both inclusive, as follows:

DEFENDANT'S EXHIBIT D, as follows:

Statement of On Sale a/c of Rev. Augustine Wirth's Books.

1897.			1897.	
Sep. 30.	To bill for manufacture of books	$193.20	Oct. 1. By royalty on books sold from Aug. 2nd to Sep. 30..	$282.36
Oct. 9.	To check.....	89.16		
Nov. 16.	To bill for manufacture of books	15.70	Dec. 31. By books sold from Oct. 1 to Dec. 21	378.20
Dec. 8.	To bill for manufacture of books	59.80		
31.	To balance.....	302.70		
		$660.56		$660.56

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1898.			1898.	
Jan. 12.	To bill for manufacture of books	$75.78	Jan. 1. By balance.....	$302.70
28.	To bill (personal).	3.90	7. By cash from B. Fitzpatrick.....	.25
17.	To bill for manufacture of books	6.70	Feb. 17. By cash from Rev. P. A. Quinn.....	.50
Feb. 9.	To check.....	227.17	Apl. 1. By books sold from Jan. 1 to Mar. 31st	749.30
Mar. 2.	To bill for manufacture of books	9.15	1. By credit.....	4.32
14.	To bill for manufacture of books	52.10	26. By cash from Rev. A. J. Croquet...	.50
Apr. 7.	To check.....	682.27	May 7. By do. from Rev. J. J. Hefferman..	.50
May 5.	To bill for manufacture of books	52.64		
July 14.	To check.....	106.86	June 30. By books sold from Apl. 1 to June 30th	158.50
Sep. 6.	To bill.....	1.71		
Oct. 8.	To bill for manufacture of books	19.63	Sep. 26. By cash from Rev. J. B. McKinely..	.46
Dec. 31.	To balance.....	299.67	Dec. 31. By books sold from July 1 to Dec. 31st	320.58
		$1,537.58		$1,537.58

1899.			1899.	
Jan. 24.	To bill for manufacture of books	$91.50	Jan. 1. By balance.....	$299.67
			Feb. 17. By cash.....	50.00
Feb. 6.	To bill for manufacture of books	50.00	Apr. 1. By books sold from Jan. 1 to Mar. 31st	348.75
15.	To bill for manufacture of books	7.80	June 30. By do. from Apl. 1 to June 30.....	157.15
Jan. 24.	To check.....	299.67		
Mar. 23.	To bill.....	1.42	Oct. 1. By do. from July 1 to Sep. 30....	155.30
Ppl. 15.	To check.....	253.03		
July 21.	To check.....	152.15		
Oct. 9.	To check.....	155.30		
		$1,010.87		$1,010.87

1900.			1900.		
Jan. 16.	To check.....	$240.90	Jan. 1.	By books sold from Oct. 1 to Dec. 31/99	$240.90
31.	To bill.....	1.30			
Feb. 1.	To bill.....	1.25			
14.	To bill.....	5.96	Apl. 1.	By do. from Jan. 1 to Mar. 31....	289.85
Apl. 9.	To check.....	281.34			
July 12.	To check.....	265.30	Juy 1.	By do. from Apl. 1st to June 30th.	265.30
Oct. 9.	To check.....	175.75			
Dec. 26.	To bill for manufacture of books	223.52	Oct. 1.	By do. from July 1st to Sep. 30th.	175.75
			Dec. 31.	By balance.....	223.52
		$1,195.32			$1,195.32

139 *Statement of On Sale a/c of Rev. Augustine Wirth's Books.*

1901.			1901.		
Jan. 1.	To balance.....	$223.52	Jan. 1.	By cash.....	$223.52
8.	To bill.....	6.38	21.	By cash.....	6.38
24.	To check.....	109.45	1.	By books sold from Oct. 1st to Dec. 31/00	109.45
Feb. 21.	To bill.....	1.65			
Apl. 18.	To check (returned May 15).....	334.55	Apl. 1.	By do. from Jan. 1st to Mar. 31..	336.20
26.	To bill.....	22.49	May 15.	By check returned	334.55
May 4.	To bill.....	8.08	July 1.	By books sold from April 1 to June 30th	237.90
June 21.	To bill for manufacture of books	365.29	29.	By cash.....	61.31
Sep. 23.	To check.....	237.90	Oct. 1.	By books sold from July 1st to Sep. 30th	298.70
Oct. 23.	To check.....	298.70			
		$1,608.01			$1,608.01

Statement of On Sale a/c of Rev. Augustine Wirth's Books.

1902.			1902.		
Jan. 25.	To check.....	$175.40	Jan. 1.	By royalty on books sold from Oct. 1 to Dec. 31/01.....	$175.40
June 2.	To check.....	349.00			
July 15.	To check.....	53.20	June 1.	By do. from Jan 1 to May 31/02....	349.00
30.	To bill for manufacture of books	57.01	July 1.	By do. from June 1 to June 30.....	53.20
Oct. 9.	To check.....	186.50	Aug. 5.	By cash.....	57.01
Dec. 8.	To bill for manufacture of books	89.98	Oct. 1.	By royalty from July 1 to Sep. 30/02	186.50
			Dec. 31.	By balance.....	89.98
		$911.09			$911.09

1903.			1903.		
Jan. 1.	To balance.....	$89.98	Jan. 1.	By royalty on books sold from Oct. 1 to Dec. 31/02....	$192.20
20.	To check.....	102.22			
Apl. 29.	To check.....	246.45	Apl. 1.	By do. from Jan. 1 to Mar. 31/03....	246.45
June 30.	To bill for manufacture of books	76.90	July 1.	By do. from Apl. 1 to June 30/03....	162.40
30.	To bill for manufacture of books	46.00	Oct. 1.	By do. from July 1 to Sep. 30/03....	125.90
July 31.	To check.....	39.50			
Oct. 21.	To check.....	125.90			
		$726.95			$726.95

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1904.			1904.		
Jan. 20.	To check.....	$157.80	Jan. 1.	By royalty on books sold from Oct. 1 to Dec. 31/03....	$157.80
Feb. 26.	To bill for manufacture of books	78.62	Mar. 10.	By cash.....	84.94
Mar. 2.	To do.	6.32	Apl. 1.	By royalty on books sold from Jan. 1 to Mar. 31/04....	200.95
Apl. 13.	To check.....	200.95	27.	By cash.....	111.69
22.	To bill for manufacture of books	111.69	July 1.	By royalty on books sold from Apl. 1 to June 30/04....	107.80
July 14.	To check.....	107.80	Oct. 1.	By royalty on books sold from July 1 to Sep. 30/04.....	237.50
Aug. 31.	To bill for manufacture of books	88.78			
Oct. 12.	To check.....	148.77			
		$900.73			$900.73

1905.			1905.		
Jan. 26.	To check.....	$168.10	Jan. 1.	By royalty on books sold from Oct. 1 to Dec. 31/04....	$168.10
Apl. 19.	To check.....	224.85	Apl. 1.	By royalty on books sold from Jan. 1 to Mar. 31/05....	224.85
July 26.	To check.....	112.45	July 1.	By royalty on books sold from Apl. 1 to June 30/05....	112.45
Oct. 28.	To check.....	200.00	Oct. 1.	By royalty on books sold from July 1 to Sep. 30/05....	200.00
		$705.40			$705.40

1906.			1906.		
Jan. 22.	To check.....	$156.45	Jan. 1.	By royalty on books sold from Oct. 1 to Dec. 31/05....	$156.45
		$156.45			$156.45

Mr. BURR: I would like from you a stipulation following at this point that record similar in all respects to Exhibit D was kept in the same manner and upon the same form with each of the said volumes of Wirth books; the memorandum at the top varying according to the agreement between the parties in each case.

The entry in the account concerning all the books except Runolt's Sermons, beginning with the words "plates belong to" is as follows: "Plates belong to Rev. Wirth. Paper, print and binding to be charged to Rev. Wirth, and this is done at cost price of paper and print."

141 X Q. 136. Mr. Benziger, if I understand your testimony given upon your examination in chief upon this point it was that all the royalties due under the contract of July 23, 1897, which accrued to the date of the death of Augustine Wirth were paid to him and that thereafter and up to a certain point the royalties accruing by virtue of that contract were paid to the Rev. Father Hilary?

A. They were.

X Q. 137. At a certain time you ceased to pay these royalties to the Rev. Father Hilary, did you?

A. Yes.

X Q. 138. Do you recall that date?

A. That was January 1, 1907. All the payments were made to the Right Rev. Abbot Hilary Pfraengle to January 1, 1907, and I want to correct my statement on my direct examination to conform to this statement.

X Q. 139. These payments were made to the Rev. Father Hilary in his capacity as an officer or president of the Order of St. Benedict of New Jersey, were they?

A. As to who was entitled to it?

Mr. BURR: I move to strike out the answer of the witness as not responsive to the question asked. Read the question to the witness.

X Q. 140. (Question read by the stenographer.) Why did you cease making these payments to him?

A. I am under the impression that it was suggested by Mr. Arnold, who had arranged it with the Right Rev. Abbot.

X Q. 141. You mean, of course, Frank W. Arnold, Esq., one of your attorneys in this case?

A. I do.

X Q. 142. Was the arrangement you mentioned in writing?

A. I do not remember that it was made in writing.

X Q. 143. Did you enter into any written agreement with the Order of St. Benedict of New Jersey or with the Rev. Father Hilary Pfraengle or anyone acting for them respecting the retaining by you of the royalties to accrue after January 1, 1907?

A. There may have been a letter exchanged on that subject, but I can't say for sure.

X Q. 144. Will you look that up and let us know at the next hearing?

A. Yes.

X Q. 145. Mr. Benziger, when you were first sued in the action of

Steinhauser, Administrator at Law, in the United States Circuit Court for this district, what did you do?

Mr. GLADDEN: I object to that question. What did you do.

X Q. 146. Who did you consult or confer with?

Objected to as incompetent, immaterial and irrelevant.

142 A. I am under the impression that we wrote to the Right Rev. Hilary.

X Q. 147. Will you produce the copy of that letter at the next hearing?

A. I think you have that letter.

X Q. 148. What arrangements have you made, Mr. Benziger, if any, with either the Order of St. Benedict of New Jersey or the Rev. Father Hilary Pfraengle as its officer, or any other officer thereof, concerning the payment by them of any costs, expenses or attorney's fees incurred in or about the prosecution of this law suit?

A. We have nothing to do with this.

X Q. 149. You have nothing to do with this? Why and how have you nothing to do with this?

A. Because the suit is virtually against the Right Rev. Abbot.

X Q. 150. And has he agreed to pay all the costs, expenses and attorney's fees of this litigation?

A. It is considered self-understood.

X Q. 151. It is self-understood between you?

A. Yes.

X Q. 152. Have you talked with anyone about that matter?

A. I think I might have a letter to that purport.

X Q. 153. From whom?

A. From the Right Rev. Abbot.

X Q. 154. I wish you would produce that letter also at the next hearing. Up to this point have you paid or have Benziger Brothers paid any of the costs or expenses of this litigation?

Mr. ARNOLD: Objected to as incompetent, irrelevant and immaterial.

A. We have not.

X Q. 155. Have you been asked or called upon to make any such payments?

A. We have not been called upon.

X Q. 156. Have you paid any sums of money as counsel or attorney's fees?

A. We have not.

X Q. 157. Or have you been called upon?

A. No.

X Q. 158. Have you employed counsel?

A. We have not.

X Q. 159. Did you not engage Mr. Arnold and the other lawyer in this action?

A. We did not.

X Q. 160. Do you know who did?

A. I suppose the Right Rev. Abbot.
X Q. 161. How did you happen to go to Mr. Arnold?
A. We didn't go to him.
X Q. 162. Well, how did you first make his acquaintance?
A. I suppose he called on us.
X Q. 163. Not at your request?
A. No.
143 X Q. 164. Have you any letter or writing from Mr. Arnold or the firm of Arnold & Green that they will not look to you for any personal remuneration in this case?
A. I am sure we have not such letters.
X Q. 165. But you did not employ Mr. Arnold?
A. No.
X Q. 166. Or his partner, Mr. Green?
A. No.
X Q. 167. As counsel?
A. No.
X Q. 168. Tell me definitely what is the understanding or arrangement existing between you and your firm and the Rev. Father Hilary Pfraengle concerning the prosecution of this action and the necessary costs, expenses and attorney's fees?
A. There is no arrangement. Everything goes at his expense because he is the owner of the books?
X Q. 169. And then this action while actually brought by you in your name is being prosecuted by you for and on account of the Order of St. Benedict of New Jersey?
A. It is.
X Q. 170. And was brought at their instance and request?
A. Yes.
X Q. 171. And is being so maintained?
A. It is.
X Q. 172. What arrangement, agreement or understanding, if any, have you with Rev. Father Hilary concerning the defense on your behalf of the law action of Steinhauser against Benziger Brothers?
A. There is no understanding.
X Q. 173. Well, who is paying the cost of that defense. That is, the first suit. There is one suit brought against you, and when you were sued you said you communicated with Father Hilary?
A. Yes, sir.
X Q. 174. And then shortly after that you brought a suit at his request; that is this suit?
A. Yes.
X Q. 175. Now, what is the understanding between you and the Rev. Father concerning that first suit against Benziger Brothers?
A. There was the same understanding for both suits.
X Q. 176. At the time you entered into the contract with Augustin Wirth, July 23, 1897, did you ask the consent of any church authority to enter into that contract?
A. I did not.

X Q. 177. Did you obtain from any church authority the consent that Wirth might enter into that contract?

A. We did not; and we never do in similar cases.

Mr. BURR: Cross-examination of witness suspended.

Counsel for complainants insists that the cross-examination shall be finished on or before April 9, 1909; and that the right of
144 defendant's counsel to continue a cross-examination shall not in any way be to the prejudice in this action of the complainants.

Mr. BURR: Counsel for defendant states that in all probability he will finish the cross-examination of the witness prior to April 9th, but that he cannot bind himself at this time so to do.

Redirect examination.

By Mr. ARNOLD:

R. D. Q. 178. Mr. Benziger, in answer to Mr. Burr's question you said that you did not employ Arnold & Green to appear for you in this action and in the lower action. You did, as a matter of fact, authorize Mr. Arnold and Mr. Green to appear as your attorneys in both actions?

A. We did not employ directly.

R. D. Q. 179. Put their appearance in both actions with your consent and approval?

A. It is.

R. D. Q. 180. Now, referring to the exhibits which have already been offered in evidence by Mr. Burr and which are extracts from "books on sale," Benziger Bros., I call your attention to a printed portion of said exhibits reading, "copyright payable to." Will you please inform us the significance of those words in these particular exhibits?

Mr. BURR: Defendant objects on the ground that the statement on the face of the book is not ambiguous, that the witness' own record in writing cannot be impeached by his oral testimony, and that the question calls for the conclusion or opinion of the witness, and as also incompetent, irrelevant and immaterial.

A. These books were made for our own publications where we paid royalty for copyrights on the books. In the case of the books of Father Wirth we do not pay royalty nor do we pay copyright, but we pay a commission because those are books which we only have on sale. In getting up this "book on sale" which is also used for other books which we have on sale, we used of course the same forms as we used for our own publications, and of course in the case of the "on sale" books, instead of "copyright" it ought to read "commission payable to."

By Mr. GLADDEN:

R. D. Q. 181. Mr. Benziger, when you were first sued in the common law action by the administrator of Steinhauser you first communicated with Father Hilary, did you not, in regard to it?

A. I think we did, I am not quite certain.

R. D. Q. 182. And the reason you communicated with Father Hilary was because you regarded the Order of St. Benedict
145 of New Jersey at all times to be the owner of the copyright on those books; isn't that so?

Mr. BURR: I object to the question on the ground it is suggestive and leading, and on the further ground that the reason of the witness is immaterial.

A. We did.

Recross examination.

By Mr. BURR:

R. X Q. 183. When you say that you authorized Arnold & Green to appear in these two actions for your firm do you mean that you authorized them to appear upon condition that the costs, expenses and attorney's fees should be paid by Rev. Hilary Pfraengle or by you?

A. It was self-understood that we had nothing to do with the case as we were not the owners of the plates.

R. X Q. 184. And who was to pay the counsel that you authorized to appear in the action?

A. The owner of the plate.

R. X Q. 185. And state that person by name?

A. That is Abbot Pfraengle.

R. X Q. 186. You mean the Order of St. Benedict of New Jersey?

A. Of course.

Mr. BURR: The defendant moves to strike from the record the answer in response to the last question previous to his cross-examination, on the ground that it attempts to vary, change and alter the terms of the original agreement entered into between the complainants and Augustin Wirth, dated July 23, 1897.

Rev. HILARY PFRAENGLE resumes the stand:

Cross-examination continued.

By Mr. BURR:

X Q. 251. You have heard all the testimony that was given this morning by Mr. Benziger?

A. Yes.

X Q. 252. I call your especial attention to his testimony concerning the prosecution of this action and to his understanding or arrangement with you concerning its prosecution and the payment of the costs, expenses and attorney's fees thereof. Was his testimony in that respect correct?

A. It was.

X Q. 253. Who employed the firm of Arnold & Green in this action?

A. I did.

X Q. 254. For and on behalf of the Order of St. Benedict?
A. Yes.
X Q. 255. Of New Jersey?
A. Yes.
146 X Q. 256. And that Order is paying not only all attorney and counsel fees but also all costs and expenses of this litigation?
A. Yes.
X Q. 257. And is that also true in the action of Steinhauser as administrator against Benziger Brothers pending upon the law side of this Court?
A. As far as was stated.
X Q. 258. Are you paying the costs and expenses of that action too?
A. Yes, sir.
X Q. 259. The Order of St. Benedict of New Jersey is a New Jersey corporation; is it not?
A. Yes, sir.
X Q. 260. Incorporated under the laws of that state?
A. Yes, sir.
X Q. 261. Where is its principal office and place of business?
A. The Order of St. Benedict? Trenton.
X Q. 262. New Jersey?
A. Yes, sir.
X Q. 263. And that is the same order that is paying these expenses and costs?
A. Yes.
X Q. 264. Is this agreement or arrangement with Benziger reduced to writing?
A. It is not; not to my knowledge.
X Q. 265. Is it evidenced in the form of correspondence in any way?
A. It may have come in in correspondence, but it was merely made out orally.
X Q. 266. When?
A. At the time the law suit was brought.
X Q. 267. Shortly after Benziger had been served with summons?
A. Yes, sir.
X Q. 268. Where was it made? Where were you when you agreed to all this?
A. Well, I could not say that. Either he met me over there or I met him in New York; I could not say, but it is an odious thing for an order, especially a superior like I am, to be in courts of law and the like and appear before the courts, and Mr. Benziger was a substitute for us. He was doing our work for us; and it was he who served the notice and it was through my request that he left it there.
X Q. 269. With you?
A. No; with himself. He left it as a suit standing against him.

X Q. 270. And this present action then was instituted in his name at your request?

A. Yes; my understanding and request, yes.

X Q. 271. Because of this odium that attaches to a superior appearing in court?

—. ——.

X Q. 272. Then you really look upon this present action as your own law suit?

A. Yes, sir.

147 X Q. 273. Being maintained by you in the name of Benziger Brothers?

Mr. ARNOLD: Objected to as not the fact, and as calling for a conclusion of the witness and as incompetent, irrelevant and immaterial.

A. No; rather I would say Benziger Brothers are a substitute for us.

X Q. 274. Father Hilary, you were president or chief executive officer of the Order of St. Benedict of New Jersey on the 23rd day of July, 1897?

A. Yes.

X Q. 275. What property and income did that order possess at that date?

A. Well, I could not say that.

X Q. 276. How can you give me that information?

A. That would be hard to give. We have a limit; we have a limit of income; and beyond that we only have a limit according to our incorporation.

X Q. 277. And what is that limit?

A. I think it is $3,000.

X Q. 278. Isn't it $2,000?

A. No; I think it is rather $3,000.

X Q. 279. Have you a record or book in the Order of St. Benedict showing what property is owned by the Order and what income it receives?

A. Well, we have it. It could be made out from the records like we have, but we have no income further than our college and our priests. We have no property there to bring anything from rent or such things; and then we have it also so that we cannot exceed limits of what we are allowed to take in, because we are in debt and are in debt pretty heavy, and we are glad as soon as we have something to pay off debts.

X Q. 280. Do you keep a regular set of books and have you kept a regular set of books for years?

A. Yes, sir.

X Q. 281. Who keeps those books?

A. Our Secretary.

X Q. 282. And what is his name?

A. Father Ernest. But this income comes under various headings; it comes from the church, from salaries of priests; it comes from the college.

X Q. 283. Father Ernest keeps these books?

A. Yes, you have one of them here.

X Q. 284. For how many years has he been keeping them?

A. I guess for the last 15 or 20 years.

X Q. 285. What do you understand to be the definition or meaning of the phrase "living in community"?

A. There is no member claims anything as his own, but getting all he needs from the common income that we have. No member can call anything strictly his own, but for subsistence and for all he needs, all necessary things, he depends upon the income of the community at large.

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X Q. 286. So long as he remains a member of that community?

A. Yes.

X Q. 287. And how long does he remain a member of that community?

A. He remains a member. The members are only priests, and the priests having made solemn vows can only be released from membership by dispensation from Rome from the highest authority, and that dispensation is called secularization.

X Q. 288. Well, suppose the Order ceases to afford or extend to a member the benefits of community life, then what?

A. Then the church authority must look after that. He can bring a complaint. He has full access to higher authority.

X Q. 289. Well, suppose it comes about naturally that the priest is sent away or goes away and is no longer a member there of the community?

A. He cannot be sent away.

X Q. 290. But suppose he is?

A. He belongs to the Order then. He is not dispensed from membership of the order.

X Q. 291. But he no longer obtains the benefits or advantages of community life; does he?

A. It is his own fault if he leaves.

X Q. 292. But suppose he is ordered away?

A. He cannot; it must be from higher authority.

X Q. 293. All right; suppose higher authority orders him somewhere else?

A. Then it will only be as I said by secularization, and that will always leave him open a livelihood from some other source; and secularization involves always this, Rome will not secularize one unless he obtains a bishop.

X Q. 294. This is the point I want to make, Father. Suppose one of your priests is living in community with you now in Newark, New Jersey, and some church official or competent authority orders that priest to a country where there is no Order of St. Benedict existing, is it your claim that that priest is still living in community with you?

A. Yes.

X Q. 295. Although he may be thousands of miles away?

A. Yes; his membership is not severed by distance.

X Q. 296. But he no longer obtains the benefits and advantages of community life?

A. Well, he can also refuse, in such a case he can refuse; he cannot be compelled unless it is his own will to go to a place like that.

X Q. 297. If his superior officer, church official, whatever it is, orders him can he decline?

A. He can bring in his plea and he can give his reasons and he will always be listened to. There is no force in this that one
149 would be forced out and forced to places where he would not feel at home and would not be at home any more.

X Q. 298. Suppose he is perfectly willing to go?

A. Well, that would be different.

Mr. ARNOLD: I object and move to strike out all these hypothetical questions upon the ground that they are absolutely incompetent, irrelevant and immaterial.

X Q. 299. You say that would be different. What do you mean?

A. Where he is willing to go, receives an order, he is willing to go. For instance, a member may think he has a calling to go to the Philippines to do missionary work among the Philippines or some other island, still if he feels he has a calling for that and he gets permission he goes there continuing a member of the Order. His membership is not severed by distance; by going away that way.

X Q. 300. No; it may not be severed, but it no longer can support or care for him, can it?

A. Oh, yes.

X Q. 301. Can it feed him?

A. Yes.

X Q. 302. How?

A. Send him money.

X Q. 303. Augustin Wirth was absent from the Order of St. Benedict of New Jersey for many years; was he not?

A. He was absent only at that what we call a tempus. He was liable to be recalled at any time and he went at his own request.

X Q. 304. But he was gone for many years?

A. Not so many years; three years.

X Q. 305. At various other times?

A. Yes; but he also came back again.

X Q. 306. But he was away a great many years at various times?

A. Yes, he was eleven years; eleven years he belonged to the Kansas Abbey. He was not away from home because he belonged there; he was not away because he belonged to that Abbey then.

X Q. 307. Take the three years he was in Minnesota; that was the last three years of his life?

A. Yes.

X Q. 308. Did the Order of St. Benedict of New Jersey send him any money during those three years?

A. No, he had enough income of his own.

X Q. 309. What property, real and personal, did the Order of St. Benedict of New Jersey own and possess on the 23rd day of July, 1897, and what property real and personal did it own and possess on the 19th day of December, 1901?

A. About the same that we have now. We have a college and we have a chapel, we have a community room for the priests, we
150 have 16 priests living there; they have cells and they have a dining room in common, and the income is from our college from tuition, and then also the services of the priests that attend to the congregation; we have there St. Mary's Church.

By Mr. ARNOLD:

X Q. 310. You mean the collections?

A. The collections, the salary the priests get.

X Q. 311. You say you have no personal property?

A. No.

X Q. 312. Why not?

A. Because everything is in common.

X Q. 313. I am talking about the Order of St. Benedict of New Jersey?

A. Yes; and one of its requirements of membership is that no one possesses anything in his own name; it all belongs to the community.

X Q. 314. What does that community own in the shape of personal property?

A. Traveling money when they are sent out and that is about all, and their clothes.

X Q. 315. No; not the individual members, Father, but the Order itself? Have you money in the bank?

A. We have, just only for accommodation's sake, to write checks and fill up the amount again.

X Q. 316. And what other personal property did you have at these dates?

A. I don't know of any other. Personal property is the money we used to buy things to keep the kitchen running and pay for our clothes.

X Q. 317. Therefore money is personal property?

A. Yes.

X Q. 318. But what other personal property did you have?

A. I know of none.

X Q. 319. At either one of said dates?

A. Yes.

X Q. 320. Then it is a fact, Father, that on the dates mentioned the Order of St. Benedict of New Jersey possessed no personal property whatever except some small amount of money in the bank for day to day uses and their household furniture?

A. Yes; and bills too that they were able to collect; we called that money bills payable and not paid up.

X Q. 321. Tuition?

A. Yes; and other things.

X Q. 322. To your college?

A. Yes.

X Q. 323. What did they amount to?

A. It might be different; sometimes so much and other things it would be paid up and another one would be hanging again, another bill.

X Q. 324. But aside from the things you have enumerated they had no personal property?

151 A. Yes; I forgot one thing; we had a cemetery there, but that is real estate, and that brings in about as much as it costs to keep it up.

X Q. 325. What real property did you possess at that time; just generally describe the real estate?

A. We *had* a college; that is, a building with class rooms in it, and then we have a yard as a play ground to it, and then we have our own house, which is the monastery proper, and then we have the rooms where the members sleep, and then they have a chapel room where they me-t for conversation and recreation, and then we have a dining room.

X Q. 326. You have two buildings?

A. Yes.

X Q. 327. A college building?

A. A college building proper, yes.

X Q. 328. And a chapel building?

A. Yes, a monastery proper.

X Q. 329. Do you know the value of these properties?

A. Yes.

X Q. 330. What is that valuation?

A. Between $40,000 and $50,000, free and clear of all encumbrances.

X Q. 331. You run a college there, do you?

A. Yes.

X Q. 332. And do you charge tuition?

A. Some; the most of them, those that are able to pay, but we have some of them that pay a little and some nothing.

X Q. 333. But it is the aim of the college to charge where they can?

A. Where they are able to pay. The aim of the college is to be a charitable institution. We take in many, many poor boys.

X Q. 334. About how many students have you?

A. Of late years we have averaged 110; for the last four or five years we have averaged 110. It is no boarding college; it is a day college; they come in the morning and go in the afternoon.

Mr. ARNOLD: I want to put on the record that Father Hilary is ready and willing to continue the cross-examination if desired by Mr. Burr, and that there is no further rebuttal, that as far as the plaintiff is concerned they regard the examination of Father Hilary as now complete.

Mr. BURR: I am also of the opinion that the examination of Father Hilary is complete, but have not before me my trial memorandum so cannot decide definitely. I understand that Father Hilary will be here until after Easter Sunday and I will be prepared to complete his cross-examination on any date theretofore.

152 Mr. ARNOLD: Complainants, if requested by Mr. Burr, will produce Father Hilary for further cross-examination if he is

able to attend, but this agreement is made without prejudice to the complainants to receive the full benefit of all the testimony heretofore given by Father Hilary if he does not so appear; he being now here for the purpose of cross-examination.

Further hearing adjourned to Wednesday, April 7, 1909, at 10 a. m., at the office of the Public Administrator, 119 Nassau Street.

BENZIGER
vs.
STEINHAUSER.

NEW YORK, *April* 7, 1909.

Met pursuant to adjournment.
Present parties as before.

NICHOLAS C. BENZINGER, resumed:

Recross-examination continued.

By Mr. BURR:

R. X Q. 187. Mr. Benziger, is it not a fact that since about the year 1884 and up to about the date of the death of Augustin Wirth in 1901, he purchased of the complainants in the regular ordinary course of business and trade, books, goods, wares and merchandise which they offered for sale and sold during said year and that he paid Benziger Brothers for his purchases?

A. He did, as you have seen by the accounts, yes.

R. X Q. 188. And is it not a fact that during these many years those purchases ran into quite a large sum of money, a sum in excess of $1,000?

A. Well, you have seen more of the books than I have, you are able to know better than I do because I did not look at the accounts.

R. X Q. 189. And during these years Augustin Wirth had an account with your firm for goods sold and delivered?

A. Yes.

R. X Q. 190. And is it not a fact also that at certain times and on certain occasions you would apply the royalties that came from the contract of July 23, 1897, to the liquidation of this account?

A. It was his account; well, I couldn't say that from the statement—all right, it was.

R. X Q. 191. In my examination of you, Mr. Benziger, at the last session, concerning your agreement and arrangement between Benziger Brothers and the Order of St. Benedict, I neglected
153 to ask you if this present action was instituted by you at their request; you know you are the complainants in this action?

A. Yes.

R. X Q. 192. Did you bring this action at their request?

A. That question was asked before, I think.

R. X Q. 195. Well, I have forgotten; give it to me again. Was this action instituted upon their request?

A. Upon the request of whom?

R. X Q. 194. The Order of St. Benedict or Father Hilary for them or Mr. Arnold, their counsel for them?

A. Well, we brought it in their name, yes.

R. X Q. 195. At their suggestion and request?

A. Yes, sir.

R. X Q. 196. Have you produced the correspondence between your firm and Father Hilary and Mr. Arnold to which I called your attention on the last examination, and do you produce all correspondence?

A. Yes.

Mr. BURR: The defendant being desirous of introducing this correspondence in evidence as a part of his case, it is agreed that he may do so now out of order.

Mr. ARNOLD: We want to object to it when it comes on.

Mr. BURR: Yes. The defendant offers in evidence the correspondence referred to, being 15 letters, the first being dated January 21, 1902, and the last, May 15, 1908, copies of which are as follows:

NEW YORK, *January* 21, 1902.

Right Rev. Abbot Hilary Pfraengle, O. S. B., St. Anselm's College, Manchester, N. H.

RIGHT REV. DEAR SIR: We have been informed of the death of Rev. Augustin Wirth, O. S. B., on whose books we pay a royalty. We send you herewith a copy of the agreement we had with Father Wirth about his books, and shall feel greatly obliged if you will let us know to whom in future the royalty is to be paid and in whose name the check is to be made out.

Awaiting your kind reply, and with best wishes we remain,

Very respectfully, your obedient servants,

(Signed) BENZIGER BROTHERS.

ST. ANSELM'S COLLEGE,
MANCHESTER, N. H., *January* 23*rd*, 1902.

Benziger Brothers, N. Y.

GENTLEMEN: In reply to your favor of the 21st inst. enclosing copy of agreement you had with Rev. Aug. Wirth, O. S. B.,
154 concerning his books, rec'd. Accept thanks. The royalty goes to St. Mary's Abbey, Newark, N. J., where he belonged, & checks had best be made out in my name.

With best wishes, I remain,

Sincerely yours,

(Signed) HILARY PFRAENGLE, *O. S. B.*

ABBOT ST. MARY'S,
NEWARK, N. J., *May* 17*th*, 1906.

Right Rev. Hilary Pfraengle, O. S. B., D. D., 528 High St., Newark, N. J.

RIGHT REV. DEAR SIR: We beg leave to enclose herewith copy of a letter received from Mr. Albert Steinhauser, Attorney at Law, New Ulm, Minn., in reference to the royalty on Father Wirth's

books. As you will see, he wants to know whether we are willing to turn the royalty money over to him. We shall feel obliged if you will kindly let us know what we should write to him.

Yours very respectfully and truly,
(Signed) BENZIGER BROTHERS.

NEWARK, N. J., *May 18th*, 1906.

Benziger Brothers, Barclay Street, N. Y. City.

GENTLEMEN: The Right Reverend Hilary Pfraengle has referred to us your letter to him of the 17th inst., enclosing copy of letter of Albert Steinhauser. We would suggest that you reply mailing him a copy of the following letter:

"Mr. Albert Steinhauser, New Ulm, Minn.

"DEAR SIR: Replying to your recent letter, regarding the claim of the estate of Augustin Wirth, we beg to say that we are not in a position to pay any money to you without an order of the proper court."

Very truly yours,
(Signed) GUILD, LUM & TAMBLYN.

NEW YORK, *Sept.* 11, 1906.

Messrs. Arnold & Greene, 3 Broad Street, New York City.

GENTLEMEN: We have received a summons to appear before the United States Supreme Court on the first Monday in October in the matter of the Estate of the late Rev. Augustine Wirth, with which case you are familiar. We should like you to represent us and
155 shall feel obliged if you will let us know how to proceed in the matter.

Awaiting your reply, we remain,
Very truly yours,
(Signed) BENZIGER BROTHERS.

NEW YORK, *Sept.* 13, 1906.

Messrs. Benziger Brothers, 36 Barclay Street, City.

GENTLEMEN: Your letter is received. We will be very glad to represent you in the action brought in the United States Supreme Court involving the estate of the late Rev. Augustine Wirth. We will confer with you later on again.

Yours very truly,
(Signed) ARNOLD & GREENE.

NEW YORK, *Oct.* 18, 1906.

Right Reverend Hilary Pfraengle, O. S. B., St. Mary's Benedictine Abbey, 528 High St., Newark, N. J.

RIGHT REVEREND DEAR SIR: We beg leave to enclose herewith a new summons we have received to appear in court in reference to the

royalty on the books of the late Father Wirth. Will you kindly let us have your instructions how to proceed in the matter?

Yours very respectfully and truly,

(Signed) BENZIGER BROTHERS.

(Enclosure.)

NEWARK, N. J., *Oct. 19th,* 1906.

DEAR BENZIGER BROS.: Your favor of the 18th inst. enclosing statement of Rev. A. Wirth's books sold during last 3 mos. & check for $153.45 as per within receipt rec'd. Accept thanks. This A. M. I also rec'd the new summons, etc., which according to Lawyer L. W. Arnold's last communication, which I enclose, ought to be sent to him. The best thing is to place the whole matter in Mr. Arnold's hands. I will be over to see you to-morrow (Saturday) about 10.00 A. M. bringing with me the summons, etc.

Sincerely yours,

HILARY PFRAENGLE, *O. S. B.,*
Abbot St. Mary's.

156 NEW YORK, *October 5th,* 1906.

Rev. Father Hilary Pfraengle, 528 High Street, Newark, N. J.

REVEREND SIR: Your letter of September 22nd, enclosing By-Laws of the Society in Pennsylvania came duly to hand. I have been unable to answer the same before as I have been away from the office on account of sickness. I will keep the By-Laws and use them when necessary.

The attorney for the administrator called to see me and asked me to discontinue the action brought against Benziger Bros., on the ground that he had made a mistake in bringing the action on the equity side of the Court and had misconceived his remedy. The Court on his application would discontinue, and in order to save time and expense I formally consented to such discontinuance. I assume that he will start now de novo and that Benziger Bros. will receive a second summons. If so, kindly send the same to me if it is sent to you.

Yours very truly,

(Signed) FRANK ARNOLD.

NEW YORK, *December* 15, 1906.

Messrs. Benziger Bros., Barclay Street, New York City.

GENTLEMEN: I have been in conference to-day with Mr. Arnold reference to Father Wirth's matters and I want to assure you that if hereafter it should be held by the courts that the payments made by you to the Abbey were payments which the Abbey was not entitled to, that the Abbey will return *to* the amount you have paid with interest and will pay the legal expenses in connection with the suits now pending in court.

I understand, of course, that you have no interest in this matter

and are acting in our behalf and for our benefit in the legal proceedings now pending.

Yours truly,

(Signed) HILARY PFRAENGLE, *O. S. B.*,
Abbot St. Mary's, Newark, N. J.

AUG. 14, 1907.

Messrs. Arnold & Greene, Drexel Building, Cor. Wall & Broad Sts., New York City.

GENTLEMEN: Last April, before our Mr. Nicholas went to Europe, you called our attention to the fact that it would be advisable
157 to keep back the money which is due Father Wirth's books until a decision is given by the court.

You informed us that you would write to Abbot Pfraengle and we told you that we would be willing to pay four per cent interest on the money which we kept back.

Kindly let us know if you have heard from Rt. Rev. Abbot Pfraengle so that we may know whether this arrangement is agreeable to him.

Very truly yours,

(Signed) BENZIGER BROTHERS.

NEW YORK, *Sept. 4th*, 1907.

Messrs. Benziger Brothers, 36 Barclay Street, City.

GENTLEMEN: Your letter of August 14th, received in the absence of Mr. Frank W. Arnold, has now received his attention.

We beg to advise you that he did write to Abbot Pfraengle and explained to him that for the present it would be best for you to hold the proceeds of the sales of the Wirth books, and this course was agreeable to him.

Yours very truly,

(Signed) ARNOLD & GREENE.

MAY 11, 1908.

Right Rev. Hilary Pfraengle, O. S. B., D. D., 528 High St., Newark, N. J.

RIGHT REV. DEAR SIR: We beg leave to enclose herewith copy of letter received from Arnold and Green in reference to the royalty on Rev. Augustine Wirth's books. The royalty since our last statement amounts to $1,146.84. If you wish us to comply with the suggestion made in Arnold & Green's letter, we shall be glad to send you our check in settlement.

Awaiting your pleasure in the matter, we remain,

Yours very respectfully and truly,

(Signed) BENZIGER BROTHERS.

NEWARK, N. J., *May* 12, 1908.

Benziger Bros.

GENTLEMEN: In reply to your favor of the 11th inst., I perfer to

let the royalty on Rev. Aug. Wirth's books stand with you till it is quite certain that matters are settled.

Sincerely yours,

(Signed) HILARY PFRAENGLE, *O. S. B.*,
Abbot St. Mary's.

158 MAY 15, 1908.

Rt. Rev. Hilary Pfraengle, St. Mary's Abbey, 528 High St., Newark, N. J.

RT. REV. DEAR SIR: We are much obliged for your esteemed favor of May 12th informing us that you prefer to let the royalty on Reverend Augustine Wirth's books stand with us till matters are settled. We shall therefore not do anything further in the matter for the present.

Yours very respectfully and truly,

(Signed) BENZIGER BROTHERS.

R. X Q. 197. Calling your attention to check No. 31 of the stipulation of March 29, can you tell me what became of the proceeds of that check, $334.55. I might explain to you that it is charged on your books on another account?

A. The check was returned and credited again on the account under date of May 15th.

R. X Q. 198. I call your attention to check numbered 18 of the stipulation of March 29, and ask you if you can tell me who Ambrose Huebner is?

A. I do not know who he is.

R. X Q. 199. Mr. Benziger, did you ever see the documents or papers that evidence the copyrights which Augustine Wirth obtained upon the books which you published?

A. You mean the agreement?

R. X Q. 200. No; the documents that evidenced the copyrights issued by the United States Government.

A. I did not.

R. X Q. 201. You never had possession or control of the copyright papers?

A. I had not.

R. X Q. 202. Did you bring with you your correspondence had with Father Wirth in his life-time?

A. You did not ask for it. We had very little correspondence with him; I called on him, you know, when we made the agreement.

R. X Q. 203. I mean afterwards?

A. Afterwards there was never any correspondence, not much.

R. X Q. 204. Are you familiar with Hoffman's Catholic Directory?

A. I am.

R. X Q. 205. What is it?

A. It is called of all Catholic priests in the United States and orders in the United States.

R. X Q. 206. A directory of all the priests; is it an official directory?

A. Well, it is. Each diocese sends in their list, [—] know; the way I understand it, each diocese sends in their list. I don't know whether you call that official or not official.

159 R. X Q. 207. Do you publish this directory?

A. We do not. We could have been the publishers of it, but we did not go for it; we had enough other things to attend to in our business. I think it is the only directory now.

R. X Q. 208. Mr. Benziger, in due course of mail did you receive a letter from Mr. Albert Steinhauser, the defendant herein, dated February 18, 1905, copy of which is as follows: "Feb. 18/1905. Messrs. Benziger Brothers, Chicago, Ills. Gentlemen: I am duly qualified and acting administrator of the estate of Rev. Augustin Wirth, deceased. I should be pleased if you would send me a certified copy of your contract with him in the matter of publishing his books. You may also state how much money has been paid by you on his account since January 1st, 1902, and to whom. Any expenses that may be incurred for the information asked, will be paid for as soon as the Probate Court of Brown County has passed upon it.

"If you do not have this information at your Chicago office, please write to me to that effect. You need not refer it to your office at New York City, because a similar letter has gone forward to them to-day. Yours truly, Albert Steinhauser, New Ulm, Minn.?"

A. Well, the letter was addressed to our Chicago house and sent from our Chicago house to New York.

R. X Q. 209. You received it?

A. Yes.

Mr. BURR: I offer it in evidence.

Letter marked Defendant's Exhibit E, April 7, 1909, J. A. S., Ex'r.

R. X Q. 210. And did you answer that letter under date of February 25, 1905, a copy of which answer is as follows: "Feb. 25, 1905. Mr. Albert Steinhauser, Attorney-at-Law, New Ulm, Minn. Dear Sir: We beg leave to acknowledge receipt of your letter of Feb. 18th, informing us that you are the administrator of the Rev. Augustin Wirth, deceased. In reply we beg leave to enclose herewith copy of a letter from the Right Rev. Hilary Pfraengle, O. S. B., Abbot of St. Mary's Abbey, Newark, N. J., of which Father Wirth was a member. We regret that under the circumstances we cannot send you a copy of our contract with the late Father Wirth as you request. Yours very truly. (Signed) Benziger Brothers."?

A. This is a copy of our letter.

R. X Q. 211. I show you your original letter of date February 25, 1905, and ask you if attached to it is a copy of the communication signed Hilary Pfraengle which you enclosed to Mr. Steinhauser, as follows: "To whom it may concern: The relatives of Rev. Augustine Wirth, of the Order of St. Benedict and member of St.

160 Mary's Abbey, Newark, N. J., are acting under the wrong supposition that what he (Father Wirth) acquired in life he acquired for himself and was really his own, and that therefore by his death they became his heirs, whereas Rev. A. Wirth was member

of the above named order and Abbey, that is strictly a religious with solemn vows, which made him incapable of possessing anything as his own, or making a will or appointing an administrator, (as he was entitled only to the use of what he needed) according to the axiom in Canon Law; 'Quidquid monachus acquirit non sibi, sed monasterie acquirit.' (That which the monk has acquired is not for himself but is acquired for the monastery).

"Besides, Father Augustine had accepted the Statutes and By-Laws of our order, duly incorporated in the State of New Jersey, according to which the members (of said corporation) bind themselves to community life, that is to give all they acquire to the Order as a corporation, which in turn guarantees a decent maintenance and reasonable care in case of sickness and disability to work, for lifetime, and decent burial, etc. Father Augustine's relatives therefore can lay no more claim to what he died possessed of, than Father Augustine was capable of making a will. All his effects of right belonged to the Order of St. Benedict, that is to St. Mary's Abbey, Newark, N. J., of which he died a member, and I have no doubt that this contention will be upheld by any of the higher courts, who acknowledge Ecclesiastical or Canon Law. Hilary Pfraengle, O. S. B., Abbot St. Mary's Abbey, Newark, N. J. St. Anselm's College, Manchester, N. H., Feb. 23rd, 1905."?

A. I don't see how that can be, that letter, because it is on Steinhauser's letter paper. I don't want to deny it; I didn't know that was going down.

Mr. GLADDEN: We admit that is a correct copy of the letter sent out by Father Hilary.

R. X Q. 212. On the 14th day of March, 1905, did you write a letter to Albert Steinhauser, and is the following a copy thereof: "March 14, 1905. Mr. Albert Steinhauser, Attorney-at-Law, New Ulm, Minn. Dear Sir: In reply to your letter of Feb. 27, we beg leave to inform you that since Father Wirth's death, the royalty on his books has been paid regularly to Right Rev. Hilary Pfraengle, of Newark, N. J., to whose abbey Father Wirth belonged. Abbot Pfraengle must have a copy of the contract, and we advise you to write him if you want a copy of it, or his lawyers Messrs. Guild, Lum & Tamblyn, Prudential Building, Newark, N. J. Yours very respectfully and truly, Benziger Brothers. (Signed)"?

A. Yes, this is a copy of that letter.

161 HILARY PFRAENGLE, resumed:

Cross-examination continued.

By Mr BURR:

X Q. 335. Father Hilary, are you acquainted with Hoffmann's Catholic Directory?

A. Yes, I have used it many years.

X Q. 336. And you know of it as a book and publication?

A. Yes.

X Q. 337. What is Hoffmann's Catholic Directory?

A. It gives the statistics of the Catholic Church in the United States and its dependencies; that is, it names the diocese, the bishops of the diocese and the priests and also gives the names of the churches of which they have charge and also the various religious communities.

X Q. 338. Does it likewise give the orders to which the various priests belong, if any?

A. Also.

X Q. 339. Is it an official directory of the Catholic Church?

A. It is considered such.

X Q. 340. It is a standard authority?

A. It is considered such.

X Q. 341. And recognized as an authority by the Catholic Church?

A. Yes.

X Q. 342. And members of that church?

A. Yes.

X Q. 343. Is the book I have in my hand a copy of Hoffmann's Catholic Directory for the year 1896 (Handing witness book.)

A. Yes.

X Q. 344. Does Augustine Wirth's name appear therein?

A. What year is it?

X Q. 345. 1896.

A. Yes; at that time he was stationed in Newark.

X Q. 346. Do you know how this book is prepared?

A. Usually there is one in a diocese appointed by the bishop, or several, to gather these statistics of the respective diocese.

X Q. 347. And forwarded to the publishers?

A. Yes.

X Q. 348. Then the information there contained is furnished by the authorities of the Catholic Church?

A. Yes, by their order.

Mr. GLADDEN: Motion is made to strike out all the questions and answers relating to the Catholic Directory, as incompetent, irrelevant and immaterial, and also as not within the personal knowledge of the witness.

By Mr. ARNOLD:

X Q. 349. Do you mean by their authority or by the authorities?

A. By the order of the bishops.

162 By Mr. BURR:

X Q. 350. It contains a list of all the Catholic clergymen in the United States?

A. Yes. At least all those that are active, and even those that are sick and usually put in as absent—with leave of absence.

X Q. 351. And do you find Augustine Wirth's name in the 1896 directory?

A. Yes, that is it (indicating).

X Q. 352. What is the meaning of the words "O. S. B."?

A. Order of St. Benedict.

X Q. 353. After his name?
A. Order of St. Benedict, Diocese of Newark.
X Q. 354. And does "New" in parenthesis stand for the diocese of Newark?
A. Yes.
X Q. 355. And Elizabeth, N. J., means——
A. New Jersey, where he was stationed; 403 Spring Street.

Mr. BURR: The defendant offers in evidence the entry referred to by the witness found at page 658 of Hoffman's Catholic Directory for 1896, reading as follows: "Wirth, Augustine, O. S. B., (New)" after that, "Elizabeth, N. J., 403 Spring Street and Magnolia Avenue."
Mr. GLADDEN: Objected to as absolutely incompetent and immaterial and not the best of evidence.
Mr. BURR: But no objection is made as to its time or place of offering.
Mr. ARNOLD: No.

X Q. 356. And the book that I hold in my hand, is that the volume of Hoffmann's Directory for 1897?
A. To my best knowledge, yes.
X Q. 357. And do you find Augustine Wirth's name therein at page 628?
A. Yes, the same as before, the same address as before.

Mr. BURR: The defendant offers in evidence the entry referred to by the witness at page 628 of Hoffmann's 1897 Directory as follows: "Wirth, Augustine, O. S. B., (New), Elizabeth, N. J., 403 Spring Street and Magnolia Avenue.
Mr. GLADDEN: Objected to as incompetent, irrelevant and immaterial and not the best of evidence and not binding upon the complainant.

X Q. 358. And is this book which I have in my hand a copy of Hoffmann's Directory for 1899?
A. Yes.
X Q. 360. And do you find Augustine Wirth's name on page 680 of this book?
A. Yes, the same as last.
163 X Q. 361. Upon this page the letters O. S. B. do not appear after his name, do they?
A. Not here, no.

Mr. BURR: The defendant offers in evidence the entry referred to by the witness at page 680 of the 1899 directory as follows: "Wirth, Augustine, (St. P.), Springfield, Minnesota."
Mr. GLADDEN: Same objection.

X Q. 362. And is the book which I hold in my hand a copy of the same directory for 1900?
A. Yes.
X Q. 363. And do you find Augustine Wirth's name there on page 703?

A. Yes; Brother Augustine, St. Paul.

Mr. BURR: The defendant offers in evidence the entry referred to by the witness on page 703 of the 1900 directory, as follows. "Wirth, Augustine, (St. P.) Springfield, Minnesota."

Mr. GLADDEN: Same objection.

X Q. 364. And is the book that I have in my hand now a copy of the directory for 1901?

A. Yes.

X Q. 365. And do you find Augustine Wirth's name upon page 712 of that volume?

A. Yes.

Mr. BURR: The defendant offers in evidence the entry referred to by the witness at page 712 of the 1901 directory, as follows: "Wirth, Augustine, (St. P.), Springfield, Minnesota."

Mr. GLADDEN: Same objection.

X Q. 366. From about the year 1898 Augustine Wirth was a member of the archdiocese of St. Paul, was he not?

A. He was not a member of it, he was there to give his services.

[X Q. 368.] And that fact is also shown, is it not, by Hoffmann's Directory for 1899 at page 147?

A. Yes.

X Q. 368. And the entry there is, Springfield, Brown County, St. Raphael's Reverend Augustine Wirth—St. Raphael's is the name of the church?

A. Yes.

X Q. 369. And this information is found in that portion of the directory under the archdiocese of St. Paul?

A. Yes.

X Q. 370. That is in Minnesota?

A. Yes.

X Q. 371. There is also an order of St. Benedict in Minnesota, is there not?

A. Yes.

X Q. 372. And they have a college there, have they not?

A. University, yes.

X Q. 373. And a Monastery?

A. And an Abbey, yes.

X Q. 374. And the Right Reverend Peter Engel is the Abbot?

A. Present Abbot.

X Q. 375. And was in 1898?

A. Yes.

164 X Q. 376. And the information concerning this abbey and the members thereof is found at page 465 of the directory for 1899, is it not?

A. Yes,—well, Augustine was not a member of that abbey, he was a member of our abbey.

X Q. 377. Augustine was not a member of that abbey?

A. No, he was a member of our abbey and remained so until death.

X Q. 378. And the information concerning that abbey found in Hoffmann's Directory for the years 1899, 1900 and 1901 does not disclose his name as a member of that abbey?

A. You mean St. John's?

X Q. 379. Yes.

A. He is not mentioned there because he was not a member; they couldn't put him down as he was not a member.

X Q. 380. Father Hilary, I find this given as a definition of the phrase or expression "Living in community," and I wish you would tell me where, in your opinion, the definition is incorrect: Living in community means in a religious house of the order or society to which the individual belongs and attending those religious exercises and other observances of the order in common with the other members of the community leading the common life of that body and attending their prayers and worship.

Mr. GLADDEN: I object to the question as incompetent, irrelevant and immaterial; it has nothing to do with the issues in this case.

A. That definition would only be a definition at large, in a very large sense, but here—we speak of the Order of St. Benedict—we speak of an order that has solemn vows.

X Q. 381. Would that change the meaning of the phrase "Living in community"?

A. No, it would include that, but the main thing is not mentioned there; the vows are what really make a religious order.

X Q. 382. Then, in your definite- of living in community, would you include the definition which I have just given?

A. Also prayer, yes.

X Q. 383. Can you tell me who Ambrose Heubner is?

A. Yes, he is a priest of our Order and our abbey, a member of our abbey; he is a Benedictine, a member of the Order of St. Benedict and belonging to our abbey.

X Q. 384. Is he treasurer of any institution?

A. Treasurer? No; he was for a time, he was accountant for us at St. Mary's Abbey.

X Q. 385. He was?

165 A. Yes; procurator as we call them; he had to keep the accounts and order things necessary for the kitchen and the like.

X Q. 386. Was he acting as Treasurer for any fund or institution under the direction of Bishop Wigger?

A. No.

X Q. 387. I show you checks of Benziger Brothers numbered 34, 35, 36, 37, 38 and 40 upon the stipulation of March 29th, and ask you if the signature on the back of those checks, "Hilary Pfraengle, P. E.," is in your handwriting?

A. No; that is in the handwriting of our bookkeeper, our procurator, and he signs for me. That is Father Ernest.

X Q. 388. Father Ernest?

A. Yes.

X Q. 389. P. E.?

A. "P." stands for Pater.

X Q. 390. And the E. for what?

A. Ernest.

X Q. 391. And the E. for Father Ernest?

A. Yes.

X Q. 392. The initials P. E. being placed under your signature to show who signed your name?

A. Yes.

X Q. 393. And the checks numbered upon said stipulation 39, 41 and 42 were endorsed by you personally?

(Handing checks to witness.)

A. Yes; these are my personal endorsements.

X Q. 394. Father Hilary, when did you first learn that Augustin Wirth had entered into a written contract with Benziger Brothers, which is dated July 23, 1897?

A. About the time, I guess, he did it; I guess he spoke about it at the time he did it.

X Q. 395. Did you know that prior to that time Benziger Brothers had been selling his books for him?

A. I have no clear recollection of that.

X Q. 396. You know that he was buying and selling these books?

A. I know that he was selling books.

X Q. 397. Father Hilary, what is a secular priest.

A. A regular priest is one that has the holy orders, the orders of a priest; that means the minor orders and the major orders, deacon, sub-deaconship and priesthood, and a secular priest is one that works for souls in the congregation under the direction and care of the bishop of the diocese.

X Q. 398. What do you mean by the expression "under the care and direction of the bishop of the diocese?"

A. He cannot have jurisdiction unless he has it from the bishop. He cannot take charge of a congregation or a church unless permission is given to him by the bishop, he is liable to be removed and liable to correction by the bishop.

X Q. 399. Have you with you the books of account of the Order of St. Benedict of New Jersey?

A. I have.

166 Mr. ARNOLD: Before we go into that, can I not ask Father Hilary a question?

Mr. BURR: Yes.

By Mr. ARNOLD:

X Q. 400. Father Hilary, a priest who belongs to an order like the Order of St. Benedict is entitled for his life to care and support during that time, and a secular priest is entitled to such care and support only during his capacity to act as a priest?

Mr. BURR: The defendant objects to the question, upon the ground that it calls for the conclusion or opinion of the witness; upon the further ground that it is an attempt to vary, change, alter or modify the terms of written documents, to-wit, the Act of Incor-

poration of the Order of St. Benedict, the so-called charter thereof, the By-laws and the alleged Rule of St. Benedict, and a certain document, copy of which is attached to the amended bill of complaint and known as Exhibit C, pleaded in the amended bill of complaint, by parol evidence; and that the testimony to be given is incompetent, irrelevant and immaterial.

A. Well, they have different arrangements in different dioceses; in many dioceses the priests contribute—when a priest gets sick they contribute; they have a fund. They help a priest when he gets down, broken and unable for work, and they see that he has a livelihood.

X Q. 401. That applies to a secular priest?

A. Yes.

X Q. 402. How about a priest belonging to the order?

A. Well, he has all he wants; as long as the order exists he is a member of the order; he is like a child.

Mr. BURR: The defendant objects to the question, upon the ground that it calls for the conclusion or opinion of the witness; upon the further ground that it is an attempt to vary, change, alter or modify the terms of written documents, to-wit, the Act of Incorporation of the Order of St. Benedict, the so-called charter thereof, the by-laws and the alleged Rule of St. Benedict, and a certain document, copy of which is attached to the amended bill of complaint and known as Exhibit C, pleaded in the amended bill of complaint, by parol evidence, and that testimony to be given is incompetent, irrelevant and immaterial.

X Q. 403. That is his right under the community law, or the law of the community?

A. Which?

167 X Q. 404. The question is: You said that he is like a child, etc. Now, that you mean—that is his right under the law of the community?

A. Yes.

Mr. BURR: The objection above repeated in haec verba. The defendant now moves to strike out the answers of the witness last above given to the questions propounded by Mr. Arnold, for the reasons that it calls for the conclusion or opinion of the witness; upon the further ground that it is an attempt to vary, change, alter or modify the terms of written documents, to-wit, the Act of Incorporation of the Order of St. Benedict, the so-called charter thereof, the by-laws and the alleged Rule of St. Benedict, and a certain document, copy of which is attached to the amended bill of complaint and known as Exhibit C, pleaded in the amended bill of complaint, by parol evidence, and that the testimony to be given is incompetent, irrelevant and immaterial.

By Mr. BURR:

X Q. 405. Father Hilary, it is a violation of the rules of your order to take oath as a witness in an action, is it not?

A. No, it is not.

X Q. 406. (X Q. 399 repeated as follows: Have you with you the books of account of the Order of St. Benedict of New Jersey? A. I have.)

X Q. 407. Will you produce them, if you please?

A. Relating to Father Wirth? We have two ledgers, and the other is too large to carry over.

X Q. 408. May I see the book that you have brought?

A. (Handing book to counsel.) The other book I didn't bring; it is only the accounts with Benziger and after Augustin's death, when he began payments with us, and you have all those things.

X Q. 409. Yes. What other accounts are in the ledger that you did not bring?

A. Only that.

X Q. 410. Well, but what other general accounts?

A. House accounts, different accounts—kitchen accounts, college and church account- and various accounts.

X Q. 411. Any accounts with the various members of your order?

A. No. Their names are not mentioned—we have only different heads for the college and things of that kind.

X Q. 412. But no individual accounts?

A. No.

X Q. 413. I merely want to see if I can safely exclude that book.

A. Yes.

X Q. 414. Well, now, let us see the book that you have here.

A. The papers are where the accounts refer to Augustin.

168 X Q. 415. What is this book which I have in my hand?

A. A ledger.

X Q. 416. Kept by the order of St. Benedict of New Jersey during certain periods which include January 9, 1888, and December 31, 1890?

A. Yes.

X Q. 417. Can you tell me how far back in point of time this book goes?

A. Not any more than the dates given—January, 1883.

X Q. 418. And is it still a current account or is it still——

A. No, we have a new book now.

X Q. 419. Can you tell me when it ended?

A. It contains Augustin's account; I guess you don't need more than that.

X Q. 420. Down to and including August 25th, 1897—at least down to that date?

A. Yes.

X Q. 421. Down to the time he went to Minnesota?

A. Yes.

X Q. 422. What is the account upon page 355 of this ledger? (Handing book to witness.)

A. One of those are moneys that Augustin gave us, accruing from books and the like—accruing from his books.

X Q. 423. Well, take the first entry, January 9; that isn't from anybody's book, is it?

A. Well, it is a note.

X Q. 424. Interest on Lamb's note; is that right?
A. Yes.
X Q. 425. Have you any personal recollection of Lamb's note?
A. Well, I don't remember the note but I know that it existed.
X Q. 426. Who had that note?
A. To understand this whole account here; Augustin had two sources of income; one source was with permission of his superiors, the sale of these books, that was one source and that was always kept separate and apart from the other source.
X Q. 427. And where is that kept in this book?
A. Well, it was not kept because he was permitted, when he came to us, to retain that money, but he could not dispose of it without the permission of his superiors. He was procurator, he was far and above the work required of him, and the permission was, when he came to us, that the money accruing from those books, they could be disposed of by him with the permission of his superiors for charitable purposes.
X Q. 428. How was that permission; in what form—that was an oral permission?
A. Yes.

Mr. BURR: The defendant moves to strike out the answer of the witness concerning the permission of Augustin Wirth, dealing with the moneys arising from his publications just given, on the
169 ground that he is testifying to a conversation or transaction had with a deceased person, Augustin Wirth, and that he is a party interested in this action as shown by his testimony already heretofore given.

The WITNESS: And then these amounts he gave to us *he gave to us* would be like some of his money he had invested in loaning out in taking notes.
X Q. 429. I see one here, note of Sauer $1,534.50.
A. Yes; and that was paid over to us; he gave us the note.
X Q. 430. There are no charges of any kind or character against Augustin Wirth upon that account, are there?
A. No.
X Q. 431. They are entirely credits?
A. Yes.
X Q. 432. Do you know Mr. Sauer?
A. I did; he is dead many years ago, I guess about ten years.
X Q. 433. Do you know the transaction by which he borrowed money of Augustin Wirth?
A. I don't remember.
X Q. 434. And is this account which we have before us at page 355 the entire account kept by the Order of St. Benedict of New Jersey with Augustin Wirth, from the time he joined you in 1887 until he moved to Minnesota?
A. Concerning the income that he had from books, yes.
X Q. 435. Well, but that is not only from books, Father Hilary, it shows on its face that there are incomes there from other sources.
A. No; he was allowed income from his books.

X Q. 436. Well, you mean to say that the Sauer note of $1,534.50 was income made from his books?

A. From his books.

X Q. 437. How do you know that, father?

A. Because he had to account for the others. That is the reason I said one must remember two sources of income; another source of income was his salary for administering the sacraments and taking charge of churches and the like; that was another source.

X Q. 438. Must he account to you for that?

A. When he disposed of accounts it would have to be with the permission of his superiors.

X Q. 439. What became of that $1,534.50?

A. Well, we used it.

X Q. 440. You used it?

A. Yes.

X Q. 441. And you say that that came from the sale of books?

A. It couldn't come from any other source.

X Q. 442. Well, doesn't the book show that it came from Mr. Sauer's note?

A. Yes.

170 X Q. 443. Well, now, Mr. Sauer paid $1,534.50 to Augustin Wirth and he in turn paid it to you, didn't he?

A. Gave us the note, yes, to collect.

X Q. 444. Now, you have no personal knowledge of where the money came from that Augustin Wirth loaned to Sauer?

A. I told you that.

X Q. 445. Now, just listen to my question, please: You have no personal knowledge, I am asking you for your personal knowledge, have you any personal knowledge of the source from which the money came that Augustin Wirth loaned theretofore to Mr. Sauer?

A. Yes.

X Q. 446. When did he loan this money?

A. Well, I couldn't say that.

X Q. 447. Where was he when he loaned the money?

A. Elizabeth.

X Q. 448. He loaned it to Mr. Sauer after he joined you?

A. Before—no, it is after '88.

X Q. 449. Well, that is when it was paid back. Now, when did he loan it to him?

A. Well, he loaned it very likely before.

X Q. 450. Before he joined you?

A. Yes.

X Q. 451. Then you don't know anything about it yourself, do you?

A. I know it from hearing it from him.

X Q. 452. But no other way?

A. No.

X Q. 453. Is all of the moneys which you received from Augustin Wirth from the sale of books upon that account?

A. Yes.

X Q. 454. Then the order of St. Benedict of New Jersey never received any moneys from Augustin Wirth on account of the sale of books after December 12, 1899?

A. I suppose not; for a time Benziger used to send it to us but that stopped, you know. I believe the last payment made to us, I believe, was September——

X Q. 455. Well, you are thinking about this time, you are confusing——

A. No, you asked the question whether we got any moneys.

X Q. 456. (X Q. 454 read by the stenographer.) The answer is what?

A. January 2, 1907.

X Q. 457. Then the payments that you have just referred to as coming from Benziger Brothers were the payments made to you after the death of Augustin Wirth?

A. Yes.

X Q. 458. Then prior to his death the last moneys which you received from—which the Order of St. Benedict received from Augustin Wirth was December 12, 1889?

A. Yes, I suppose that must be correct—yes, here I overlooked these entries in the other books, all for books, beginning January 29, 1902, the other book I left at home, you know.

171 X Q. 459. What is that name? (Indicating.)

A. Frederick Severs.

X Q. 460. Is he living?

A. I think he is living, yes.

X Q. 461. Where?

A. In Elizabeth.

X Q. 462. New Jersey?

A. Yes.

X Q. 463. And what is that? (Indicating.)

A. Edward Ives.

X Q. 464. Is he living?

A. No.

X Q. 465. Peter G. Traub, is he living?

A. That I couldn't say, I guess he is.

X Q. 466. Where did he live?

A. Elizabeth.

Mr. BURR: The defendant offers in evidence the account found at page 355 of this ledger, as follows:

"Rev. Augustin, O. S. B.

1888.				
Jan.	9.	Int. Traub's note	60	$16.50
	20.	For bks.	61	40.
Mch.	15.	Cash	71	460.
	16.	Book	71	20.
	31.	Book	73	5.
Apl.	4.	Book	74	30.
May	1.	Cash	79	141.24
	7.	Cash	80	55.

	21.	Cash	81	16.50
June	6.	Cash	84	25.
	18.	Cash	85	20.
	25.	Cash	86	20.
Nov.	10.	Cash note Sauer	109	1534.50
Dec.	10.	Cash	115	33.
'89.				
Jan.	18.	124 interest Ives' note (see int.)		81.
		to		
Mch.	5.	132 cash bks. sold (Exp. acc't)		500.
		143 cash Fred. Sever, interest (see int. a/c)		28.75
Nov.	6.	170 cash Pet. J. Traub (see int. a/c)		33.
	13.	Cash Pet. J. Traub (see int. a/c)		33.
	13.	170 Edw. Ives (see int. a/c)		67.50
Dec.	12.	176 Cash Fred Severs		28.75

It is hereby stipulated and agreed that on or about the 1st day of September, 1907, an action in equity was duly instituted in the Circuit Court of the United States within and for the District of Minnesota, Second Division, wherein the Order of St. Benedict of New Jersey is complainant and the said Albert Steinhauser, as
172 Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, is defendant; that said action is still pending undetermined and was instituted and is being maintained for the following among other purposes: (1) To have it adjudged that the equitable title of the moneys accruing by virtue of the contract between Augustin Wirth, deceased, and the complainants herein, dated July 23, 1897, is in said Order of St. Benedict; that the equitable title to the copyrights of all of the books mentioned in this amended bill of complaint be adjudged to be in said Order; that the payments made by the complainants herein to said Order of St. Benedict be adjudged to be valid payments and that the Order of St. Benedict are entitled to the moneys so paid and not the defendant therein, Albert Steinhauser, as administrator, etc.; that the equitable title of other moneys, property, notes and mortgages belonging to or in the possession of Augustin Wirth at the date of his death be adjudged to be in the said Order of St. Benedict, and that all other of said moneys paid and to be paid, said copyrights, said other notes, mortgages and property be adjudged to be the property of the Order of St. Benedict; and that the judgment therein direct that the defendant, Albert Steinhauser, as administrator, pay over and transfer to said Order of St. Benedict all of the moneys, properties, notes and other property to said Order of St. Benedict and that he also assign to said Order all of said copyrights; that the answer of the defendant therein and the complainant's replication are both in substance the same as the answer and replication in this action.

X Q. 467. Father Hilary, have you with you the correspondence between Augustin Wirth after he went to Minnesota and yourself or the Order of St. Benedict?

A. I have no correspondence, no.

X Q. 468. You had no correspondence?

A. You mean the correspondence that I destroyed; I didn't keep the letters.

X Q. 469. Were those letters addressed to you merely as a friend or as in your capacity as head of the Order of St. Benedict?

A. Well, he gave a little news at some times, he was building a new school out there.

X Q. 470. Then your correspondence with him during this period was merely of a social character?

A. Not always; one time it was on business; when he failed to give his yearly account.

Mr. BURR: I move to strike out the answer of the witness to the effect that he had failed to give his yearly account, as not called for by the question and as stating the conclusion of the witness and contents of letters.

173 X Q. 471. Did Augustin Wirth render to your yearly accounts while he was in Minnesota?

A. He did not.

X Q. 472. Do you know of Father Wirth's trips abroad in the last years of his life?

A. The last year.

X Q. 473. The last year?

A. Not of his life but his last.

X Q. 474. The last years of his life?

A. No, I don't know; he made no trips.

X Q. 475. Didn't he go to Europe in 1900 or 1901?

A. No; he went to Europe in 1897.

X Q. 476. Did he make more than one trip abroad?

A. No.

X Q. 477. Do you know whether he brought back with him one of his nieces?

A. I don't know.

X Q. 478. You don't know anything about that?

A. No.

Further hearing adjourned to Wednesday, April 14th, 1909, at 10 o'clock a. m., at the office of the Public Administrator, 119 Nassau Street, N. Y. City.

BENZIGER
vs.
STEINHAUSER, ETC.

NEW YORK, *April 19th*, 1909.

Met pursuant to adjournment.
Present: Counsel as before.

HILARY PFRAENGLE, resumed:

Cross-examination continued.

By Mr. BURR:

X Q. 479. Father Hilary, I understand your testimony to be that Augustin Wirth went to Kansas in 1857 and remained there until 1868?

A. Yes.

X Q. 480. And there he had charge of a parish or church and a college?

A. He was sent there to build up the place; college, church, monastery.

X Q. 481. Then in 1868 he returned to St. Vincent's for a short time and the same year left for Minnesota?

A. Well, I couldn't say that—St. Vincent's of Philadelphia—no, I think it was more likely from Kansas he went to Minnesota.

X Q. 482. He went to Minnesota in 1868?

A. '68.

X Q. 483. Remaining at Cedar Lake, Minnesota, from 1868 to 1871?

A. Yes.

X Q. 484. At Mankato, Minnesota, from 1871 to 1874, and at St. Anthony in Minnesota from 1874 to 1875?

A. Yes, at St. Anthony, I think that is it.

174 X Q. 485. That from 1875 to 1880 he had charge of the congregation at Greenburgh, as you have testified to?

A. Yes. He returned then to St. Vincent's.

X Q. 486. In 1880 he went from Greenburgh to Elizabeth, New Jersey ?

A. Yes.

[X Q. 467.] Where he remained and had charge of a parish or church there until 1887?

A. Yes.

X Q. 488. Then, if I understand it, you say that he was at St. Mary's Abbey from April 3rd, 1887, to May 23rd, 1889?

A. Yes.

X Q. 489. And then he was sent to take charge of a church at Wilmington, Delaware?

A. Yes.

X Q. 490. And he remained in Wilmington from June 1st, 1889, to November 11th, 1889?

A. Yes.

X Q. 491. He returned from Wilmington to Elizabeth, New Jersey?

A. Yes.

X Q. 492. And took up his work there anew?

A. Yes.

X Q. 493. And remained at Elizabeth until the summer of 1897?

A. Yes.

X Q. 494. At which time he went to Europe and traveled there and in this country for his health?

A. Yes.

X Q. 495. Until April, 1896?

A. Yes.

X Q. 496. And then again went to Minnesota, this time going to Springfield in September, 1898?

A. Yes.

X Q. 497. Father Hilary, who are Guild, Lum & Tamblyn?

A. They are attorneys in Newark.

X Q. 498. And on the 18th of May, 1906, were they attorneys for the Order of St. Benedict?

A. I didn't mark down when they became our attorneys.

X Q. 499. They are your attorneys?

A. They were, yes.

X Q. 500. And as your attorneys, did they write to Benziger Brothers the letter dated May 18th, 1906, which has been introduced in evidence, by your authority?

A. No doubt, yes.

X Q. 501. They represented the order at that time?

A. Yes.

X Q. 502. I wish you would read the letter of Benziger Brothers to you, found at page 129 of the stenographer's minutes and introduced in evidence in this case, the letter being dated January 21, 1902.

A. Yes.

X Q. 503. You recall that letter, do you?

A. Yes.

X Q. 504. Do you recall what impression, if any, that letter made upon your mind at the time it was received?

A. Well, it appeared to me very singular, because that was the first instance in my memory and my knowledge that—well, it made a claim on a religious after his death, a claim to anything that he may have had, that came in touch with him; that is a thing unheard of before.

175 X Q. 505. Well, there is nothing in that letter, Father, of any claim of any relative. You have evidently read the wrong letter. Read the letter again. What impression did it make upon your mind?

Mr. GLADDEN: I object to that and submit that the impression is specified by the answer to the letter, which is on the record.

A. The impression was a most singular impression, it was a surprise that for the first time I ever heard of relatives laying claim to

property or anything that was in contact with a religious, also a relative of a religious because he died intestate.

X Q. 506. Well, but, Father, there is not a word in there about the claim of any relatives, not an intimation even that they were claiming anything. Benziger says here, "We send you herewith a copy of the agreement we had with Father Wirth about his books, and shall feel greatly obliged if you let us know to whom in future the royalty is to be paid—." Now, there is no intimation or suggestion of a claim on the part of relatives in that letter.

A. Well, it was not necessary to put it in at all.

X Q. 507. Did you know at that time?

A. Well, I can't remember that I put that in, but you asked me my impression.

X Q. 508. Well, when you answered me, you were not thinking of some other letter?

A. I didn't think of any letter.

X Q. 509. Well, is that the only peculiar thing that this letter suggests to you?

A. It was the main impression. I never dreamt of—because, don't you see, there was no call for such an answer in the letter there, it was only asking where the royalty should be paid to in the future.

X Q. 510. Then Benziger Brothers' letter didn't seem at all peculiar or strange to you did it?

A. No; the transaction they——

Mr. GLADDEN: No, he asked you about this letter.

A. No, that letter in itself—that which called for this letter did.

X Q. 511. What called for the letter, if you know?

A. Well, the relatives, they made claim to—they thought he had money and they laid claim for it.

X Q. 512. But, Father, the relatives, didn't make claim for some two or three years after that.

A. Well, I heard before that.

X Q. 513. Had you heard the rumor?

A. Yes.

176 X Q. 514. Then that fact is the only thing that struck your mind then and strikes your mind now as peculiar about Benziger Brothers' letter?

Mr. GLADDEN: Objected to as incompetent.

A. Yes.

X Q. 515. You notice, do you not, that Benziger asked to whom the royalties shall be paid to in the future?

A. Yes.

X Q. 516. Did you make any inquiry of him as to whom it had been paid in the past?

A. I knew.

X Q. 517. Oh, you knew?

A. Yes.

X Q. 518. Then you had knowledge that Father Wirth was receiving these royalties from Benziger Brothers?

A. Yes.

X Q. 519. When did you first acquire that knowledge?

A. When he made over the plates and things to Benziger.

X Q. 520. That is the time of the contract?

A. Yes.

X Q. 521. In other words, you knew he took his plates and stock of books to Benziger?

A. Yes; I also had knowledge that before these plates *they* were transferred to Benziger that he was receiving moneys from Benziger for these books.

X Q. 522. When did you first see the contract between Father Wirth and Benziger Brothers?

A. The first time?

X Q. 523. Was it when this copy was sent to you or did you see it before?

A. I saw it before; Benziger, I think, showed it to me.

X Q. 524. Before the death of Augustin Wirth?

A. Yes.

X Q. 525. You have transacted business generally with Benziger Brothers for a great many years, have you?

A. Well, we buy things there, church goods and the like.

X Q. 526. When you say "we" do you mean the Order of St. Benedict of New Jersey?

A. Yes, the Abbey.

X Q. 527. And that has been going on for a great many years.

A. Well, about twenty-five years I should think.

X Q. 528. Benziger Brothers are dealers only in Catholic Church supplies, are they not?

A. Mainly I think, but I suppose they would not refuse to work for other churches.

X Q. 529. But they cater especially to the Catholic Church?

A. Yes.

X Q. 530. Did you ever make any claim upon Benziger Brothers for the payment to the Order of St. Benedict of the
177 Royalties that accrued under this contract of July 23rd prior to the death of Augustin Wirth?

A. I did not.

X Q. 531. You never demanded of them to pay to the Order of St. Benedict any moneys that became due under the contract between the date of its making and the date of the death of Augustin Wirth?

A. No.

X Q. 532. And you don't make any such claim upon them now?

A. No, I do not.

X Q. 533. From July 23, 1897, to the date of Augustin Wirth's death, December, 1901, Benziger Brothers paid to Augustin Wirth certain sums of money from time to time?

A. Yes.

X Q. 534. Does the Order of St. Benedict make any claim of

Benziger Brothers for those — of money which they have already paid to Augustin Wirth?

A. That he had received? No.

X Q. 535. Augustin Wirth went to Europe in the summer of 1897?

A. '97 it was.

X Q. 536. Can you recall the month?

A. It was the summer of—I couldn't mention the month, but it was the summer.

X Q. 537. Well, in the summer months, July or August, then?

A. Yes.

X Q. 538. Then upon his return—which was in September, was it not?

A. No. He went to Rome first and he spent some months in Ireland, he was there for Patrick's Day in Ireland, and he did not return to Newark until Easter week, next spring.

X Q. 539. 1898, Easter week?

A. Yes, that was——

X Q. 540. April, 1898?

A. Yes.

X Q. 541. Gone abroad eight or nine months?

A. Yes.

X Q. 542. Then in September he went to Springfield?

A. Yes.

X Q 543. And did you see him from the time he left Springfield again in his lifetime?

A. I didn't see him any more after he—no.

X Q. 544. The last time you saw him was when he left for Springfield—about the time he left for Springfield?

A. Yes.

X Q. 545. Did the Order of St. Benedict pay his expenses abroad?

A. No.

X Q. 546. Or his travels in this country?

A. No; he took that out of his moneys that he was allowed.

X Q. 547. You presume he did?

A. Well, I guess he did.

X Q. 548. You don't know, do you?

A. I don't know where he got it from otherwise.

178 X Q. 549. Father Hilary, on or about February 25, you wrote a communication addressed "To whom it may concern," which is found on page 143 of the stenographer's minutes, wherein you state: "The relatives of Rev. Augustine Wirth, of the Order of St. Benedict and member of St. Mary's Abbey, Newark, N. J., are acting under the wrong supposition that what he (Father Wirth) acquired in life he acquired for himself and was really his own, and that therefore by his death they became his heirs, whereas, Rev. A. Wirth was member of the above named Order and Abbey, that is strictly a religious with solemn vows, which made him incapable of possessing anything as his own, or making a will or appointing an administrator, (as he was entitled only to the use of what he needed) according to the axiom in canon Law—" I am not

going to try and render that Latin phrase, the translation of which is "That which the monk has acquired is not for himself but is acquired for the monastery." That is your conception, is it not, of the obligation of a member of the Order of St. Benedict to the order?

A. That is my conviction, yes.

X Q. 550. That is your understanding of the obligation of the member to the order and the order to the member?

A. Yes.

X Q. 551. Father Hilary, the Order of St. Benedict of New Jersey has no business or place of business in the State of New York has it?

A. No.

X Q. 552. It does not transact any—it does not do business in the State of New York?

A. Not as an order, no.

X Q. 553. Nor maintain an office or an order house or chapter here?

A. No.

X Q. 554. Calling your attention, Father Hilary, to Rule 33 or Chapter 33 of the Rule of St. Benedict, part of which reads as follows: "The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet," etc., I ask you what is the reason for that rule? Is it to prevent jealousy?

A. No.

X Q. 555. Strife?

A. No.

X Q. 556. Or questions of a more material life or controversy?

A. No.

X Q. 557. It is not?

A. No.

X Q. 558. That forms no part of it?

A. No, that is not the motive, that is not the object to be attained by that rule.

X Q. 559. No, not the object, but is it not an essential part that the members have nothing so that these questions may be all excluded from their daily life in the monastery?

179 A. Also; but the main reason is that they may be disentangled of things of this world, of the material things of this world, disentangled from the cares and things of this world which it brings with it.

X Q. 560. So that their minds may be free absolutely for their religious work?

A. Yes.

X Q. 561. Now, of course, that only applies so long as they are in the monastery?

A. As long as they are members of the order.

X Q. 562. When they are no longer living in community it has not the same application, has it?

A. Yes.

X Q. 563. When they are out doing secular work they are forced are they not, to handle these questions, to meet them daily in the financial affairs of their church?

A. Yes; with permission.

X Q. 564. Oh, with permission?

A. Yes.

X Q. 565. Then with permission that is removed?

A. Yes.

X Q. 566. But when a priest leaves the community life with permission, to take up parish work, the very nature of his work compels him to deal with money matters, financial affairs and property?

A. When one is sent or has permission to go outside of the community to do work with permission of that nature it always carries with itself the permission to make use of these things as far as his office or his work requires it.

X Q. 567. And then it is to the best interest of the new congregation, I will say, or community in which he is working that he be able to gather to himself as much money as possible for the needs of that congregation or church?

A. Not for himself——

X Q. 568. No, but for the congregation?

A. Yes.

X Q. 569. Who controls a priest when he is in charge of a congregation, to whom is he responsible?

A. To the Superior of the order, to the Abbot of the Abbey or independent Prior, as the case may be. We have not only Abbots that are Superiors of monasteries, but we have also independent Priors.

X Q. 570. No, but when one of your members is sent to take charge of a church or parish in a distant state, to whom is he responsible while there in charge of that congregation?

A. He is responsible for the congregation, what the congregation contributes, to the Bishop of that church or that diocese.

X Q. 571. He is under his control and direction?

A. As far as the congregation is concerned.

X Q. 572. And as far as his work in the congregation is concerned?

A. Also.

180 X Q. 575. In other words, the Abbot of the Order of St. Benedict in Newark can have no voice in the management of the church affairs of a church in Minnesota even though one of its members is the pastor or priest of that church?

A. No.

X Q. 574. The priest, while there, is there with permission of the Abbot and is responsible to the Bishop or Archbishop of that diocese?

A. Of that diocese, as far as church matters are concerned.

X Q. 575. And of course while a priest is away with permission of his Abbot, he is not living a community life?

A. He is out of the community.

X Q. 576. He is living out of the community?

A. Yes.

X Q. 577. You say you gave your consent to Father Wirth's going to Minnesota in 1898?

A. '98, yes.

X Q. 578. In what form did you give that consent?

A. It was the Bishop of Newark, then Bishop Wigger, who was requested by Father Augustin to get the permission from me for him to go there after he ascertained Archbishop Ireland would take him, would accept his services.

X Q. 579. Well, what were the forms of those consents or permissions; written or oral?

A. It was written.

X Q. 580. Did Archbishop Ireland make some sort of a requisition or request upon Bishop Wigger to send Father Wirth out there?

A. No.

X Q. 581. How did Bishop Wigger know that Bishop Ireland desired Father Wirth's services?

A. Father Augustin before asking this permission had to know whether his services would be accepted there and when he was told "yes," then it was through Bishop Wigger that he got that permission.

X Q. 582. And that was the form of permission granted by Bishop Wigger?

A. He had no permission to grant; it was through him that Augustin got the permission from me.

X Q. 583. Did Bishop Wigger request you to allow Father Wirth to go to Minnesota?

A. Well, the letter—this is the letter here. (Handing counsel letter.)

X Q. 584. In the form of a letter, was it?

A. Yes.

X Q. 585. The request from Bishop Wigger for your consent to send Augustin Wirth to Minnesota was in writing, was it not?

Mr. ARNOLD: If you know; if you don't know, say no.

A. Yes.

X Q. 586. And your reply or consent was also in writing, in a letter addressed to Bishop Wigger?

A. Yes.

181 Mr. BURR: The defendant moves to strike from the testimony of this witness all that portion thereof whereof he has testified in substance or to the effect that he gave his consent that Augustin Wirth should go to Minnesota in 1898 and all testimony of the witness that he did so consent, on the ground that such testimony is not the best evidence, that it is a statement of the witness of the presumed contents of a written document, to-wit, the letter written by the witness to Bishop Wigger concerning which he has just testified.

X Q. 587. Father Hilary, when Augustin Wirth transferred his

stability to your order in 1887, did he make a transfer of his property to the order at the same time?

A. No.

Mr. ARNOLD: We move to strike out the answer on the ground that there is no evidence in the record that Father Wirth had any property at the time, and object to the question on the same ground.

X Q. 588. At that time did he make a transfer of any property to the order?

Mr. ARNOLD: Same objection.

A. No.

X Q. 589. Or thereafter, did he make a transfer of any property to the order?

A. No.

X Q. 590. And you have no knowledge of any transfer being *being* made by him at the time you say he joined the Abbey of St. Vincent's?

A. No.

X Q. 591. You were not there?

A. No.

X Q. 592. Do I understand you to testify, Father Hilary, that the Order of St. Benedict paid the funeral expenses of Augustin Wirth?

A. Indirectly, yes; I mean that it went out of the moneys that he had left.

X Q. 593. Then all the expenses which were incurred in Minnesota were not paid by the Order of St. Benedict but were taken from moneys and property which Augustin Wirth left in Minnesota?

A. Salaries and the like; accrued salaries.

X Q. 594. And is it not a fact that in addition to paying his funeral expenses and the expenses of his last illness, instead of being out any money the Order of St. Benedict actually received from Peter Engle on February 17th, 1903, $436.05, on March 14, 1903, $165.00 and on November 13th, 1903, $111.88?

A. I am not clear in memory.

X Q. 595. About those sums and about those dates?

A. I think so, yes.

182 X Q. 596. Then besides paying the funeral expenses, the expenses of the last illness and the like, the property and money which Augustin Wirth left in Minnesota and which Peter Engle took charge of at your request, amounted to something over $700, which you received?

A. I suppose that is correct.

X Q. 597. Then, too, when you testified, as I understand you did upon your examination in chief that the Order of St. Benedict has paid all the debts of Augustin Wirth, you mean that they paid such debts as have been presented to them out of the moneys which they received from Peter Engle?

A. And belonged to the Abbey.

Mr. BURR: I move to strike out the answer of the witness as not responsive to the question.

X Q. 598. (X Q. 597 repeated.)
A. Yes, but the money belonged to the Abbey.

Mr. BURR: I move to strike out that portion of the witness' answer where he says "but the money belonged to the Abbey," as not responsive to the question asked and as the conclusion of the witness.

X Q. 599. Did you know that Peter Engle made application a short time after Augustin Wirth's death to the Surrogate Court of Brown County, Minnesota, to be appointed administrator of his estate there?
A. No.
X Q. 600. Didn't you have knowledge of the application of Peter Engle for letters of administration in Minnesota?
A. I cannot remember. I do remember that I asked him to give the matter over to a trustworthy lawyer out there.
X Q. 601. See if I can refresh your recollection; Was there not some moneys in a bank out there?
A. Yes.
X Q. 602. And the bank declined to pay it unless an official be appointed by the Court to whom to pay the money?
A. Yes.
X Q. 603. And in order to get that money did not Peter Engle make application to be appointed that official?
A. I appointed him to take my place and then I told him to refer for what was necessary in the case to a lawyer and do what the lawyer advised him to do.
X Q. 604. Well, did not Peter Engle inform you that he had made application to be appointed administrator there?
A. I don't remember; I only remember that he got the power somehow to collect these moneys.
X Q. 605. But there were certain moneys he couldn't get, is not that a fact?
A. Yes; some refused to give up the money.
X Q. 606. What did he do, to your knowledge, to get that money?
A. He gave it into the hands of a lawyer.
183 X Q. 607. And did you have correspondence with Peter Engle about what he was doing to get that money at any time?
A. I had.
X Q. 608. Is that correspondence in existence now?
A. I think not now, no.
X Q. 609. But whatever Peter Engle did out in Minnesota was done at the time with your knowledge and consent and approval?
A. Consent, yes.
X Q. 610. And upon your orders and directions?
A. Yes.
X Q. 611. Do you recall whom Father Augustin brought back with — from Ireland when he returned in the spring of 1898?
A. No.
X Q. 612. You don't know whether he brought anyone back with him or not?
A. No. I didn't hear.

Redirect examination.

By Mr. ARNOLD:

R. D. Q. 613. Father Hilary, on page 119 of the record you were asked, in connection with Father Wirth's absence, "But he no longer obtains the benefits or advantages of community life, does he," and you answered, "It is his own fault if he leaves." Do you desire to add anything to that answer?

A. Yes. Now, there was a question up at one time as to what really constitutes community life. Now, there are the devotions, prayers, the choir and mass in community that certainly belongs here, but the main thing in religious life are the vows. The vows are the main thing; he is not deprived of them, the benefits of such, and the common prayers of the community, he is not deprived of them; the priests or members pray for each other.

R. D. Q. 614. Otherwise than you have testified he does not lose the benefit of the community?

A. Yes.

Recross-examination continued.

By Mr. BURR:

R. X Q. 615. If I understand your explanation it is that a priest does not lose his membership in the order by being sent away to perform other duties such as Father Wirth was performing in Minnesota, but while he is absent he lives out of communion with the order; is that correct?

A. He doesn't perform the minor duties of the order, he does not perform the duties that require his presence in the community.

R. X Q. 616. Well, he is not physically, actually living in community with the members, is he?

184 A. The minor things he cannot observe that the community observes because he is out of it.

R. X Q. 617. He is not living in it?

A. He is not living in it.

R. X Q. 618. But you still claim he maintains his membership?

A. Yes.

R. X Q. 619. But he is living out of the community?

A. Yes.

Redirect examination.

By Mr. GLADDEN:

R. D. Q. 620. Father Hilary, on your cross-examination by Mr. Burr, you stated that Father Wirth had two sources of income while he was at St. Mary's. Will you state once more what those two sources of income were?

Mr. BURR: The defendant objects on the ground that it is incompetent, irrelevant and immaterial, calling for the conclusion of the witness on matters apparent from the question not within his own personal knowledge.

A. One source of income was his salary and perquisites as rector of the church, and the other source was what he realized from the sale of his books.

R. D. Q. 621. As to the first source of income, is it a fact that he was compelled to account continuously to the Order of St. Benedict for the sums received?

Mr. BURR: The defendant objects to the question upon the ground that it is leading and suggestive, because it calls for the conclusion of the witness and because it is an attempt to vary the written book of accounts which has already been introduced in evidence in this case by parol evidence.

A. Yes.

R. D. Q. 622. Did he account continuously for the sums he received while in Elizabeth?

Mr. BURR: The defendant objects to the question upon the ground that it is leading and suggestive, because it calls for the conclusion of the witness and because it is an attempt to vary the written book of accounts which has already been introduced in evidence in this case, by parol evidence, and because the witness has already testified that the entire financial transactions between Augustin Wirth and the Order of St. Benedict are shown by said account; and I further object upon the ground that this is not proper redirect examination, and if material at all is a part of complainants' case in chief.

A. Yes sir.

185 R. D. Q. 623. State if you know whether or not Father Wirth had a special privilege to hold moneys received from the sale of his books and to use those moneys for special purposes under the express permission of his superior?

A. Yes.

R. D. Q. 624. Will you state what your understanding of that arrangement was?

Mr. BURR: I object to the witness' understanding, on the ground that it is not binding upon the Court or parties, and as incompetent, irrelevant and immaterial.

A. The understanding was that he could keep these moneys, not as his own, but have the use thereof for charitable purposes with the permission of his superiors.

Mr. BURR: I move to strike out the answer of the witness on the ground last above stated.

R. D. Q. 625. Even in the expenditure of the special sums was it necessary for him at all times to account for and to obtain permission of his superiors?

Mr. BURR: I object to the question of counsel as leading and suggestive, as calling for the conclusion and deduction of the witness and as incompetent, irrelevant and immaterial.

A. Permission either express or implied.

R. D. Q. 626. Please explain what you mean by express or implied, Father Hilary?

Mr. BURR: I object to it as not necessary for explanation and as calling for the opinion or conclusion of the witness and as incompetent, irrelevant and immaterial.

A. The moneys referred to are those which he realized from his books, and because he did that as a superogative work or work that he was not obliged to do he had that privilege or held these moneys not as his own but for the use thereof by permission. That work was superogatory, it was over and above what he was obliged to do. He used his spare hours for it, whatever time he could spare from his parish duties.

R. D. Q. 627. And it was for that reason that he was given this special privilege?

A. Yes.

R. D. Q. 627. And it was for that reason that he was given this ber of various places during Father Wirth's life to which he was sent and in which he sojourned from time to time. During all these times and at all these places was he in all instances still a member of the Order of St. Benedict?

Mr. BURR: The defendant objects to the question on the ground that it calls for the conclusion of the witness; on the further
186 ground that the question goes beyond 1887 when it is claimed by the witness that Augustin Wirth joined said order; and as incompetent, irrelevant and immaterial and calling for facts not within the knowledge of the witness as shown by his testimony heretofore given.

A. Yes.

R. D. Q. 629. At the time of his death had he renounced his allegiance to the order?

Mr. BURR: The defendant objects to the question on the ground that it is incompetent, irrelevant and immaterial, calls for the conclusion or opinion of the witness and for a fact not within the witness' knowledge because he has already testified that he did not see him after September, 1898.

A. No.

R. D. Q. 630. He was then, to your certain knowledge, a member of the order at the time of his death?

Mr. BURR: The defendant objects to the question on the ground that it is incompetent, irrelevant and immaterial, calls for the conclusion or opinion of the witness and for a fact not within the witness' k[illegible]ledge because he has already testified that he did not see him after September, 1898.

A. To my certain knowledge. May I give the reason why I know?

R. D. Q. 631. State, if you can, state the reason?

Mr. BURR: The defendant objects to the question on the ground

that it is incompetent, irrelevant and immaterial, calls for the conclusion or opinion of the witness and for a fact not within the witness' knowledge because he has already testified that he did not see him after September, 1898.

A. He could only cease to be a member of the order by secularization.

Mr. BURR: The defendant moves to strike out the answer of the witness on the ground that it is in conflict with the articles of incorporation, constitution and by-laws of the Order of St. Benedict, and as calling for the witness' conclusion.

R. D. Q. 632. Please complete your reason?
A. Secularization or expulsion.
R. D. Q. 633. And that is a formal process?
A. Yes.
R. D. Q. 634. And you as the head of the Abbey——
A. Must know of both these.
R. D. Q. 635. Now, Father Hilary, you have testified on cross-examination that when a member of the Order of St. Benedict is living outside of the community he has, in some respects, of
187 necessity certain dealings with the outside world which are not necessary during his residence in the community. Is that so?
A. Yes.
R. D. Q. 636. During, however, the performance of these functions which arise of necessity from special missions, is he at any time in any way exempted from the rules which govern the order upon which the order is founded?

Mr. BURR: The defendant objects upon the ground it is incompetent, irrelevant and immaterial and calls for the conclusion or opinion of the witness.

A. No.
R. D. Q. 637. That is, wherever he may be or under whatever circumstances, he must still be bound by all the rules and vows which he took when he became a member of the order?

Mr. BURR: The defendant objects upon the ground it is incompetent, irrelevant and immaterial and calls for the conclusion or opinion of the witness.

A. Yes.
R. D. Q. 638. You have testified that the expenses of the funeral in Minnesota and the debts in Minnesota were paid by Engle and that a balance was transmitted to you?
A. Yes.
R. D. Q. 639. That money you regarded and always have regarded as belonging to the Order of St. Benedict?

Mr. BURR: I object to the question upon the ground that it is incompetent, irrelevant and immaterial and calls for the conclusion of the witness.

A. Yes.

R. D. Q. 640. And this was because under the rules of the order it was impossible for Father Wirth to acquire property for himself?

Mr. BURR: The question is objected to upon the ground that it is incompetent, irrelevant and immaterial and calls for the conclusion of the witness, and on the further ground that the question asked by counsel is argumentative.

A. Yes.

It is stipulated that at page 368 of Hoffmann's Catholic Directory for 1897 appears the following: "Institutions in charge of religious orders," and under that, "Orders of men," and on the next line, "Newark, St. Mary's Benedictine Abbey * * * Rec. Augustine, O. S. B. (Elizabeth, N. J.)." That on page 400 of the Directory of 1899 appears the following: "Institutions in charge of re-
188 ligious orders," and under that, "Orders of men," on the next line, "Newark, St. Mary's Benedictine Abbey * * * Rev. Augustine, O. S. B. (Springfield, Minn.)," and that the same entry appears in the Directory of 1900 at page 413, the same entry appears on page 420 of the Directory of 1901.

R. D. Q. 641. In these entries, Father Hilary, I call your attention to the fact that the last name of the various members of this order is not given. Will you state what the custom was in that respect?

A. For our Abbey the custom then was to put in only the monastic name, the name they took as religious, but that custom varies though. We now have the family name—in other monasteries they have the family name.

R. D. Q. 642. But in these entries to which I called your attention, the entry "Rev. Augustine, O. S. B." is intended to indicate Augustine Wirth?

A. Yes.

R. D. Q. 643. I call your attention to a letter purporting addressed to Father Wirth and signed by W. M. Wigger under date of August 25th, 1898, and ask you how this letter came into your possession?

A. From Augustin after his death.

R. D. Q. 644. From his papers, that is?

A. How?

[R. D. Q. 644.] That is, did you find this letter in Father Wirth's papers after his death?

A. Yes.

R. D. Q. 646. Do you know the handwriting of Bishop Wigger?

A. Yes.

R. D. Q. 647. Is that his handwriting (Indicating)?

A. Yes; and I know that it is an answer to his letter.

R. D. Q. 648. And was that letter written in answer to Augustin's letter?

A. Yes, in answer to Father Augustin's appeal to the Bishop.

Mr. BURR: The defendant moves to strike the answer of the witness from the record on the ground, first, if the appeal was in writing

it has not been accounted for and his testimony is concerning the contents of that written appeal; and, second, if the appeal was oral, it is not shown that the witness had any personal knowledge thereof.

Mr. GLADDEN: I offer that letter in evidence.

Mr. BURR: The defendant objects to the reception in evidence of the letter of August 25th, 1898, on the ground it is incompetent, irrelevant and immaterial and has no bearing upon the issues in this action.

(The letter is marked Complainants' Exhibit 10, April 19, 1909, J. A. S., Ex'r, and reads as follows:)

189 "SETON HALL COLLEGE,
"SOUTH ORANGE, N. J., *Aug.* 25, 1898.

"DEAR FATHER WIRTH: The Rt. Rev. Abbot thinks that you ought to return to your monastery, but, he adds: 'If Father Augustine will promise to submit to the decision of the Abbot Primate (in the appeal made to him), he may for my part, pending said decision, take the parish the Most Rev. Archbishop of St. Paul offers him.'

"With best wishes I remain,
"Yours very sincerely,

"W. M. WIGGER,
"Bsp. of N."

R. D. Q. 649. From this letter it appears, Father Hilary, that there was some controversy between the Order of St. Benedict and Father Augustin Wirth. Will you state the nature of that controversy?

Mr. BURR: The defendant objects to the question on the ground that it calls for a transaction between the defendant in his lifetime and the witness and that the witness is in reality the complainant here in this action, and that his testimony is not admissible under the statutory laws of the State of New York, and because it is an attempt to explain or enlarge upon a written document introduced in evidence.

A. He was dissatisfied with his superiors and with himself and wanted to get away. There were various reasons for his being dissatisfied, he wanted to be relieved of parish work and again he wanted to remain at his post until finally I asked him to leave that charge.

R. D. Q. 650. Had there been occasion to complain of Father Wirth's conduct in accounting for the sums of money in his possession?

A. Yes.

R. D. Q. 651. Father Wirth, as a matter of fact, had failed to account on some occasions for sums within his possession?

Mr. BURR: I object to the leading and suggestive statement of counsel which is repeated and repeated with almost every question he asks, and I object to the question further upon the ground that it is incompetent, irrelevant and immaterial and as an attempt to

vary, change and alter the book accounts between the parties, heretofore introduced in evidence.

A. Yes. I might add the last three years of his life.

190 R. D. Q. 652. Yes. And was that the reason for his admonition by the Abbot Primate of Rome upon one occasion?

Mr. BURR: I object to the statement of counsel as not evidence and as calling for a fact not proven, and as leading and suggestive, incompetent and immaterial.

A. Yes.

R. D. Q. 654. You found it among Father Augustin's papers Augustine, purporting to be written by Hildebrand, Abbot Primate, O. S. B., from Rome, June 20th, 1897, and ask you how this letter came into your possession; where did you find it?

A. I found it among his papers after his death.

By Mr. ARNOLD:

R. D. Q. 654. You found it among Father Augustin's papers after his death?

A. Yes.

By Mr. GLADDEN:

R. D. Q. 655. Do you know the handwriting of Hildebrand?

A. He wrote me a letter.

R. D. Q. 656. About the same time, about the matters to which this letter refers?

A. Yes.

Mr. GLADDEN: I offer the letter in evidence.

(The letter is marked Complainants' Exhibit 11, April 19, 1909, J. A. S., Ex'r, and reads as follows):

"Pax:

"MY DEAR REVEREND F. AUGUSTIN: It is a long time since I want to write to you, but I have postponed it for some time in the hope my letter would be useless on account of your entire submission to your Superior and to the Rule of Monastic life. It has proved a vain hope since you have not yet complied, which I consider a duty, with the advice I gave you when at Rome.

"And, indeed, coming over to the Eternal City without leave, was a real and grave fault against your vows for which you ought not only to ask pardon from God but also from your Superiors. It was, besides, a very bad example given to all the members of your congregation, and you ought to desire to atone for it unless you might grow responsible before the Lord for all the evil which might grow out of it.

"There is also another point which caused me uneasiness for your eternal salvation and this is the money you keep and make use of without permission. It is self evident that you were spending a good deal of money during your journey without any permission, since your journey was first unknown and then highly disap-

proved of by your Abbot. And ever since your return did
191 you ask for leave to spend the amount you did? I am greatly afraid you did not, and if so your responsibility is great.

"Do you believe, my dear Father, that I am not aware of the peculiar circumstances in which the monks on the mission *is* obliged to regulate money matters. Certainly it may be an occasion to contract the habit of dealing with money too freely and without proper leave, but the occasion cannot justify your way of acting.

"I want you, therefore, to do two things, the first to write to your Abbot in order to apologize for your past conduct and then to forward him the account of the money you keep and of that you have *sepnt*, asking your Superior how you are to behave in this respect for future time. You may readily understand, my dear Reverend Father, how it is painful to me to write in such a strain to one who has spent so many years *and* our holy order and has exerted himself so much both by his ministry and his writings for the welfare of others. If I exhort you thus it is because it is my duty to admonish those under my care such as was yours to admonish your people. Having done it so well and so often you will understand why I must do it myself. What I have asked you to do is not difficult to execute and I feel quite sure that having proved thus your good will, your Superiors will meet you with real and paternal kindness.

"Recommending myself to your fraternal prayers and asking God to bless you I beg to remain, dear Rev. Father,

"Yours very sincerely in St. B.,

HILDEBRAND,
"Abbot Primate O. S. B.

"St. Anselm's, Monte Aventino, Roma, June 20th, 1899."

R. D. Q. 657. I call your attention to a letter addressed to "Right Rev. and dear Abbot," under date of August 23rd, 1898, signed by W. M. Wigger, Bishop of Minnesota, and ask if that letter was written to you?

A. Yes.

R. D. Q. 658. Do you know Bishop Wigger's writing?

A. Yes.

R. D. Q. 659. Is that his writing?

A. Yes.

Mr. GLADDEN: I offer it in evidence.

Mr. BURR: Objected to as incompetent, irrelevant and immaterial.

(The letter is marked Complainants' Exhibit 12, April 19, 1909, J. A. S., Ex'r, and reads as follows):

192 "SETON HALL COLLEGE,
"SOUTH ORANGE, N. J., *Aug.* 23, 1898.

"RT. REV. AND DEAR ABBOT: Father Augustine Wirth, O. S. B., has this morning shown me a letter from the Most Rev. Archbishop of St. Paul, in which His Grace offers him a Parish, stating

that the place is open for him. Would you kindly give him permission to accept that Parish ad tempus? Kindly drop me a line to let me know wour wishes in this matter, and oblige.

Yours most sincerely,

W. M. WIGGER,
"Bp. of Ma."

By Mr. ARNOLD:

R. D. Q. 660. Father Hilary, as far as you know, Father Wirth, at the time that he joined your order, had no property of any kind whatsoever?

A. He had some—from his books, not much; but he had some permission before he joined us as regards his books.

Mr. BURR: The defendant moves to strike out that portion of the witness' answer -herein he says "but he had some permission before he joined us as regards his books" as not responsive to the question asked, as argumentative and clearly not within the witness' personal knowledge.

R. D. Q. 661. Outside of his property from his books, did he have anything?

A. Not to my knowledge.

R. D. Q. 662. Now, referring to the record, page 153, wherein appears a statement of certain moneys turned over to the Abbey by Wirth between January, 1888, and December, 1889, please state briefly what those moneys were?

Mr. BURR: The defendant objects to the question on the ground that it is an attempt to vary or change the written account by parol evidence, and that the account is clear and intelligent and does not need explanation and shows on its face in most instances what the moneys were from.

A. They were from sales of books that he gave us.

R. D. Q. 663. Now, in one case appears an entry of Traub's note. Give an explanation of that entry.

Mr. BURR: I object to it as incompetent, irrelevant and immaterial, an attempt to change the written document already introduced in evidence and as calling for a transaction between the witness and the decedent in his lifetime, and owing to the facts developed in this case incompetent under the statutes of the State of New York.

193 A. They were moneys loaned to different parties, moneys that accrued from his books.

R. D. Q. 664. You are testifying not only to the Traub note but also the Ives note and the Sauer interest?

A. Yes.

R. D. Q. 665. And you know, as a matter of fact, that the moneys loaned on those notes were the proceeds of the sales of his books?

A. Of the sales of books, yes.

Recross-examination.

By Mr. BURR:

R. X Q. 666. How do you know that the moneys loaned to Traub and the moneys loaned to Sauer were the proceeds of the sale of Augustin Wirth's books?

A. Because the moneys that he obtained as salary, as perquisites from parish work, had to be sent to us, to the Abbey.

R. X Q. 667. These were in 1888 and he only came to you the year before?

A. Yes.

R. X Q. 668. Now, he didn't accumulate two or three thousand dollars in that year, did he?

A. No; I guess he worked at books before that, before he joined us.

R. X Q. 669. But do you know what he did with the proceeds of them?

A. He had permission, the same permission, that continued.

R. X Q. 670. No, but do you know what he did with the proceeds?

A. Yes.

R. X Q. 671. Personally?

A. Yes.

R. X Q. 672. You were in Newark?

A. He did not have to account to me.

R. X Q. 673. No, no, answer my question. You were in Newark?

A. Yes.

R. X Q. 674. And Father Wirth was then in——

A. Elizabeth.

R. X Q. 675. No, before that. He was in Elizabeth and he was in Minnesota and he was in Kansas, was he not, accumulating this money?

A. Yes.

R. X Q. 676. And you have no personal knowledge, you couldn't have any personal knowledge, could you, of what he did with the money?

A. I could only account for moneys after he joined us and I continued the permission; before he joined I continued it.

R. X Q. 677. I want your personal knowledge. You say that the money that he loaned to Traub and to Sauer came from the proceeds of his books?

A. Yes.

R. X Q. 678. How did you know that that money wasn't given to him by one of his parishioners?

194 A. That is next to impossible.

R. X Q. 679. Oh, next to impossible?

A. Yes.

R. X Q. 680. How do you know the money came from the sale of his books?

A. Because he had to send the money to the Abbot.

R. X Q. 681. Just your knowledge—you believe that the moneys came from the sales of his books, you have no knowledge of it?

A. No.

R. X Q. 682. And while he was in Elizabeth you have no personal knowledge of what moneys he acquired from the sales of his books?

A. Yes.

R. X Q. 683. How could you?

A. Benziger always showed——

R. X Q. 684. Showed you?

A. Showed the amounts.

R. X Q. 685. Told you?

A. Yes.

R. X Q. 686. Do you mean to say then that he accumulated these sums while he was in Elizabeth?

A. I don't know.

Mr. BURR: I move to strike from the record all that porton of the witness' testimony where he has testified in substance or to the effect that all the moneys shown upon this account accrued to Augustin Wirth from the sale of his books, on the ground that it is shown by the witness' testimony that he was giving his opinion or his belief and not a statement of fact.

R. X Q. 687. Now, you say that Father Wirth had but two sources of income?

A. Yes.

R. X Q. 688. Do you know what sources of income he had when he was in Kansas?

A. No.

R. X Q. 689. You were not there?

A. No.

R. X Q. 690. You don't know what sources of income he had when he was in Pennsylvania?

A. No.

R. X Q. 691. You were not there?

A. I did not mean to say that he had two sources of income all the days of his priesthood.

R. X Q. 692. No, and when you say that he had two sources of income you are stating your belief?

A. My own knowledge while he was with us.

R. X Q. 693. Well, now, then, if you limit it to the time he was with you that is another question entirely.

A. Yes.

R. X Q. 694. You intend to state, do you, that his sources of income concerning which you have testified only apply during the period that he was with you?

A. To my knowledge.

Mr. BURR: The defendant moves to strike from the record all that testimony given by the witness concerning the sources of income of Augustin Wirth during the entire period from 1857 to the date of his death, 1901, except from May, 1887, to December, 1889, on the ground that such testimony is the opinion and belief of the witness and not a statement of fact.

195 R. X Q. 695. Father Hilary, you have exhibited here some papers and documents which came into your possession from the effects of Augustin Wirth. What other papers or documents or letters have you in your possession or under your control that were found among the effects of Augustin Wirth?

A. They are the only ones that have any reference to this—the only letters that have any reference to this matter.

R. X Q. 696. You have other letters and papers?

A. I destroyed them; there were some private letters.

Redirect examination.

By Mr. ARNOLD:

R. D. Q. 697. Father Hilary, please state whether the paper I show you is a correct statement of Father Augustin's movements from the time he went to St. Vincent's Abbey, Pennsylvania, in 1851 down to the time of his death, chronologically arranged?

A. Yes.

Mr. ARNOLD: Now counsel offers the paper in evidence with the express stipulation on his part that any statement in said paper which does not refer to a date or a place shall be evidence in his favor and against the defendant.

Mr. BURR: The defendant objects to the introduction of the paper in evidence because it is incompetent, irrelevant and immaterial; it is not shown by whom it was prepared; its accuracy is not proven; it contains statements purporting to be of fact, which have not been proven in this action.

R. D. Q. 698. This was prepared by you and it is your handwriting?

A. It is in my handwriting from authentic documents, acquired from authentic documents.

Mr. BURR: The defendant now moves to strike the exhibit from the record, on the ground that it is stated by the witness that it was copied by him or prepared by him from authentic documents, which documents are not produced or accounted for.

(The paper is marked Complainant's Exhibit 13, April 19, 1909, J. A. S., Ex'r, and reads as follows):

"Rev. Augustine Wirth, O. S. B.

"Born in the Diocese of Wuerzberg, Bavaria, M'ch 17th, 1828.

"Came to St. Vinc. Abbey, Pa., as candidate of the Order, June 4, 1851.

"Received monastic habit at St. Vinc., Pa., Aug. 15th, 1851.

"Made Solemn Vows at St. Vinc., Pa., Aug. 15th, 1852.

196 "Was ordained to the priesthood, Pittsburgh, Pa., Dec. 8th, 1852.

"Was sent to Kansas from 1857 till 1868.

"Was sent to Minn. viz

"Cedar Lake, 1868-1871;

"Mankato, 1871-1874;

"St. Anthony, 1874-1875.

"Had charge of Congregation, Greenburgh, Pa., 1875-1880.
"Went to Elizabeth, N. J., 1880-1887.
"Transferred his vows from Kansas to St. Mary's Abbey, Newark, N. J., May 15th, 1887.
"Remained at the Abbey from Apr. 3, 1887, till May 23rd, 1889.
"Was sent to take charge of ch. in Wilmington, Del., June 1, till Nov. 11, 1889.
"Returned to Elizabeth, N. J., 1889 till (summer) of 1897.
"Traveled in Europe & this country for his health till Apr., 1898.
"Was sent to Springfield, Minn., Archd. St. Paul, Sept., 1898.
"Died at Springfield, Minn., Dec. 20, 1901.
"Was buried St. John's Abbey, Stearns Co., Minn."

Recross-examination.

By Mr. BURR:

R. X Q. 699. You say that Father Wirth was dissatisfied with his superiors?
A. Yes.
R. X Q. 700. I suppose you mean his superiors in the Order of St. Benedict of New Jersey, do you not?
A. Yes; at that time.
R. X Q. 701. That was when?
A. That was in '97.
R. X Q. 702. That is at the time that he left and went to Minnesota?
A. No; he traveled about for a year or so.
R. X Q. 703. Before he went to Minnesota?
A. Yes.
R. X Q. 704. And that dissatisfaction continued at least for a time while he was in Minnesota?
A. I didn't get any except one letter while he was in Minnesota.
R. X Q. 705. You only got one letter from him?
A. Yes.
R. X Q. 706. Was that unusual?
A. He should have answered more often; he should have given an account once a year at least.
R. X Q. 707. But he did not?
A. No.
R. X Q. 708. And notwithstanding the admonition of the Abbot Primate, Complainant's Exhibit No. 11, Augustin Wirth did not account to you?
A. No.
R. X Q. 709. Did you ever receive an account from Augustin Wirth?
A. Not I, not while in Springfield.
197 R. X Q. 710. You have testified concerning the special privilege which you granted to Augustin Wirth, to use his own moneys, and to your understanding concerning the use of those moneys by him. Was that special permission in writing?
A. No, it was a privilege only continued by me.

Mr. BURR: I move to strike out all of the witness' answer after "No."

R. X Q. 711. When was this privilege, when did you say you granted this privilege to Augustin Wirth?

A. Well, I can't say for sure; I know that the old Archabbot of St. Vincent's had already conceded that privilege, and he died in 1887.

R. X Q. 712. And do you know whether that permission was in writing?

A. No; such permissions are not given in writing.

R. X Q. 713. They are not given in writing?

A. No.

R. X Q. 714. Those permissions are all oral?

A. Yes.

R. X Q. 715. And then the understanding of that permission and of the use of the moneys, concerning which you have testified, was also an oral understanding which you were testifying about?

A. Yes.

Mr. BURR: The defendant moves to strike out all of the testimony of the witness concerning his understanding of the use or purpose to which Augustin Wirth would use his moneys, and all of his testimony in substance or to the effect that he could only use his money for charitable or religious or church purposes, on the ground that it calls for a transaction between the decedent and the witness and because, as shown by the testimony already given in this action, the witness is a real, actual party complainant in this suit and such testimony is inadmissible under the statutes of the State of New York.

R. X Q. 716. Father Hilary, you have testified that Augustin Wirth accounted for his salary and perquisites which he received?

A. He accounted, yes.

R. X Q. 717. How did he account to you for them?

A. By sending a yearly statement, and whatever balance there was giving it to the Abbot; sending a yearly statement and also the balance in money.

R. X Q. 718. Where are those statements?

A. In our books.

R. X Q. 719. And are the substance of all those statements shown in the book which has been introduced in evidence.

A. No. We keep the statements, as a rule, as sent in and we only credit the amounts paid in money.

R. X Q. 720. But you told me, Father Hilary, that this book account which you produced was the only one which you have with Augustin Wirth?

198 Mr. ARNOLD: No, only as to the books.

A. Except those moneys paid by Benziger later on after his death.

R. X Q. 721. But I asked you the direct question if the book which you had before you and which I introduced in evidence showed the entire money transaction between the Order of St. Bene-

dict and Augustin Wirth during the entire time he was a member of the order and you said yes.

A. With the exception, I said, of moneys paid to us after his death and which is in another book, and I mentioned too at the time that you have all of those amounts from Benziger himself, the identical bills, etc.

R. X Q. 722. Now, wait a minute, let me be certain about this. I understood you to tell me in response to a question that the book account which I introduced from your book contained the entire money transactions between Augustin Wirth and the Order of St. Benedict from the date he transferred his stability to your order until the date of his death.

A. That cannot possibly be, because I told you expressly when you asked that question, I said yes, with the exception of moneys that accrued after his death from the book royalties and those I said, those amounts are entered in another book and not this book.

R. X Q. 723. Then I understand you to say that he was not to strictly account to you yearly for the moneys arising from the sale of his books but only for his salary and for his church money?

A. And for his outlays out of his personal moneys.

R. X Q. 724. And you wanted to know what he was expending, did you?

A. Yes; that is, he had to have permission.

R. X Q. 725. Yes, you wanted to keep in touch with that so that you could see what he was spending?

A. Yes.

R. X Q. 726. It was moneys received in his religious work, not moneys received in his capacity as an author that you wanted him to strictly account for each year?

A. Yes, that is it.

R. X Q. 727. And the moneys that he received in his capacity as an author he had your permission to use and to do with as you have already testified?

A. Yes.

R. X Q. 728. And all those moneys he never accounted to you for?

A. No.

R. X Q. 729. Except such entries as may appear in the book that has been introduced?

A. Yes.

R. X Q. 730. Then, Father Hilary, take this admonition of the Abbot Primate, Complainant's Exhibit 11 of today. What were the moneys that were in controversy here, moneys that Augustin
199 Wirth received from the sale of his books or moneys which came into his possession through the transaction of his church work?

A. It must have been from his books, and the Abbot Primate did not understand the question there. He did not know that privilege that Augustin had.

R. X Q. 731. Were you making complaint to the Abbot Primate

that Augustin Wirth failed to account for the moneys which he received from his books?

A. No.

R. X Q. 732. It was the moneys which he failed to account for that he obtained in the prosecution of his work as a priest?

A. Yes.

R. X Q. 733. And was that one of the causes of contention between you and Father Wirth?

A. No; he was disgruntled, he was not well, he was sickly and one time he would write that he was going to give up his parish work and another time again he would want me to coax him to stay and I did once and he was dissatisfied again and he wanted to go, and I would tell him again, "You ought to try again," and I got him help and at last he got so disgruntled that he left without permission.

By Mr. ARNOLD:

R. X Q. 734. He got old, wasn't that it?

A. Yes, and he was sickly.

By Mr. BURR:

R. X Q. 735. Father Hilary, did I understand you to say in response to Mr. Gladden's question that there are only two methods by which a member of the Order of St. Benedict may cease to become a member?

A. Yes.

R. X Q. 736. And what were those two—expulsion was one?

A. And secularization.

R. X Q. 737. And secularization was another?

A. Yes.

R. X Q. 738. I call your attention to the constitution and by-laws of the Order of St. Benedict of New Jersey, section XI, paragraphs 2 and 3, and ask you if that secton of that constitution and by-laws is now and has at all times been in force?

A. Yes.

R. X Q. 739. And has been at all times?

A. At all times. Voluntary leaving is secularization.

R. X Q. 740. You say that voluntary leaving is secularization?

A. Yes.

R. X Q. 741. Define secularization?

A. It is when a religious, a priest, by permission of the Pope, Holy Father, the Head of the Church, is dispensed from his vows and also dispensed from his obligation of living in the monastery.

200 R. X Q. 742. Secularization comes not from a member of the order but from some officer or superior of the order who has power to secularize, isn't that so?

A. Yes.

R. X Q. 743. Well, you don't mean to tell me that that is voluntarily leaving the order, do you?

A. He cannot be secularized unless he wants to be voluntarily; voluntar*ily* secularization; he cannot be forced to have himself secularized.

R. X Q. 744. But the voluntary leaving of anything does not depend upon the act of some other person.

[*R. X Q. 745*]. *In this case it does?*

R. X Q. 745. In this case it does?

A. He is bound for life by his vows and the only way to get out is by secularization, being secularized, by transferring the vow of obedience to a bishop and being dispensed by living with permission outside of the monastery.

R. X Q. 746. And then you say that the words "by voluntarily leaving the order" for any purpose whatsoever do not mean just what they say, do you?

A. Oh, they do. Voluntary means to take steps for secularization.

R. X Q. 747. Does that say so?

A. No, but it means that. There is no other way of getting out of the monastery.

R. X Q. 748. Suppose they join some other order?

A. They can't even do that.

R. X Q. 749. But suppose they do?

A. Well, they do wrong.

R. X Q. 750. Well, lots of people do wrong.

A. Yes. You can always hold them to their vows, their obligations.

R. X Q. 751. Well, their membership is lost?

A. No.

R. X Q. 752. It says so.

A. Well, that isn't voluntary leaving.

R. X Q. 753. It says "Membership is lost by joining any other order or secret society or any other religious denomination." That means just what it says, doesn't it?

A. It means by permission.

R. X Q. 754. It don't say so.

A. It is the only way they can read that; it is called voluntary because he must take steps to do that with respect to religious.

R. X Q. 755. You are speaking now of a good man, a man that obeys the spirit of your institution?

A. Yes.

R. X Q. 756. And you mean that no good member would do that, but you don't mean to tell me that he cannot avail himself of this rule or by-law if he saw fit to break your laws, contemptuously or otherwise?

201 A. He cannot free himself from his vows by his own will and act unless it be in the proper course or through the proper course, which is by secularization.

R. X Q. 757. I think there is some confusion. You are talking of the Order of St. Benedict that exists all over the country, perhaps the one that lives in Rome; I am talking about the Order of St. Benedict of New Jersey, a New Jersey corporation whose by-laws and constitution says that membership is lost in that a member is dismissed, that membership is lost if a member joins any other order or secret society. Now you have no control over the act of your members to prevent them from joining the Masonic Order if they see fit?

Mr. GLADDEN: I object to it; this is merely argument between the witness and counsel, a discussion of an academic question.

A. That is called voluntary too, because he would be expelled if he remains in that state, why he would have to be expelled.

Mr. ARNOLD: What do you mean by that, Father?

The WITNESS: For instance, if one commits a crime, commits a murder or rape and all of that which may happen, well, such a one—it is voluntary, he goes out of the order because he does such things, because they can't keep him any more.

R. X Q. 758. Membership is lost if he commits rape?

A. He is secularized—another way is by secularization, that is voluntary, because you can't secularize a priest without his will.

R. X Q. 759. You can't refuse him?

A. You can put in the veto.

R. X Q. 760. Suppose he joined the Episcopal Church?

A. That would be another denomination, that would take him out of the order if he persevered in that.

R. X Q. 761. Referring to the stipulation, Father Hilary, which has been made between counsel here to-day concerning the entries in Hoffmann's Catholic Directory with respect to St. Mary's Benediction Abbey at Newark. Who furnished the publishers of these books with the information contained at these various pages to which reference has been made to-day?

A. That is done by one appointed by the Abbot.

R. X Q. 762. Some one that you appoint?

A. Yes; well, it is not necessarily that, the Prior can appoint one; there may be one or two, there is no definite purpose for that; but afterwards the Superior goes through it to see whether it is correct or not.

202 R. X Q. 763. Then this information contained in these books is sent to the publishers of these volumes by the Orler of St. Benedict?

A. Yes.

Redirect examination.

By Mr. GLADDEN:

R. D. Q. 764. I call your attention Father to a letter signed by Hildebrand, Abbot Primate, O. S. B., and dated Rome, February 5th, 1899, and I ask you if this letter was written to and received by you?

A. Yes.

R. D. Q. 765. Do you know the handwriting of Father Hildebrand?

A. Yes.

R. D. Q. 766. And was this letter written in connection with the subject mentioned in Complainant's Exhibit 11?

A. Yes; in part at least.

Mr. GLADDEN: I offer that in evidence.

(Letter marked Complainant's Exhibit 14, April 19, 1909, J. A. S., Exr., and reads as follows):

"Pax:

"RIGHT REV. MY DEAR F. ABBOT:

"I am very thankful for your fraternal letter which you have done well to direct me.

"Rev. F. Augustin Wirth came to me in order to complain about several things as I wrote you at the time. I communicated about the same affair with the Right Rev. the Abbot President of your Congregation who was, of course, the proper authority to appeal to. I am convinced that he called your attention on such points that might have been to redress and that you endeavored to comply with his fraternal remarks. I fell myself that it must be difficult in a town and in midst such surroundings of modern life and growths to keep up in all and single particulars the original type of monastic life, which our common Father St. Benedict devised at Subiaco's Cave and carried out on the top of Cassino. And yet if we do not impart to those around us the example and the esteem of a mortified and devoted life, who ever will do so?

"You have done well to allow F. Augustin to accept the place he now is in, but certainly his present condition is most unsatisfactory. He left America, he traveled about, he came back again, without your leave and without any apology for his conduct. He might be termed a fugitivus and unless he was in good faith, he would have been liable to the pains established by Canon Law against those who thus trespass.

"And again keeping and spending money as you say and as he does is quite against the laws of the church. Here again he would be guilty and undergo punishment except for ignorance. 203 When he was here I was not aware of this possessing money and I did not call his attention in a special manner to the pains he was liable, for fear he might take some desperate steps, instead of returning to America on which I insisted.

"Now, however, that he has come back I am of the opinion that his past conduct ought not to remain without blame. I believe, therefore, and you may do so in my name if you like, that before giving him final leave to remain where he is ought to write a letter of apology to you, leaving apart if he wants, the charge against you, but deploring his disregard of discipline and obedience. You might then forgive him after imposing a suitable penance. And with regard to money matters you ought at least to impose hi mto give you a minute account of what *be* possesses and to oblige him to tender in every six months an account of his expenses.

"Such steps seem to me most necessary, in order to keep up monastic discipline because if people get aware that one may do ever so many things without being checked the result would, indeed, be disastrous for the young professed.

"The Holy Sacrifice has been said at your intentions and I hope that your health may keep stronger. Let us always try and learn something looking upon the Cross. There our Master teaches us what is to be done and how to do it; namely, the salvation of men by sacrifice and self-denial.

"Recommending myself to your fraternal prayers I beg to remain, my dear Right Rev. F. Abbot,

"Ever yours humbly (Sign of cross),

"(Sign of Cross) HILDERBRAND,

"Abbot Primate, O. S. B.

"Rome, St. Anselm's, Aventine, Feb. 5th, 1899."

Mr. Burr announces that he has finished his examination of Father Hilary.

It is hereby stipulated that the signing of testimony and the certification by the Examiner is now waived, and it is further stipulated in the action now pending in the State of Minnesota between the Order of St. Benedict as plaintiff and Steinhauser as defendant, that notwithstanding the fact that the testimony in this action of Father Hilary is not signed, said testimony may be read with the same force and effect as though signed in said action in Minnesota.

Complainants rest.

204 Mr. BURR: The defendant moves to dismiss the bill and the amended bill—to dismiss this action—upon the pleadings and evidence adduced by the complainants for the following reasons:

1. Because this Court is without jurisdiction under Section — of the Act of March 3, 1875.

2. Because this Court has no jurisdiction to hear or determine this case.

3. Because the pendency and maintenance of this bill in equity is a fraud upon this Court.

4. Because the pendency and maintenance of this bill in equity is a fraud upon the jurisdiction of this Court.

5. Because it is contrary to equity and good conscience to permit the complainants to maintain their bill in equity.

6. Because this action is only maintainable under the ancillary jurisdiction of this Court, and it is shown by complainants' own testimony that the Order of St. Benedict of New Jersey is the real party in interest herein and that this action and this bill in equity is being maintained and prosecuted for and on account of the Order of St. Benedict of New Jersey by Benziger Brothers and for sole use and benefit; at their direction and at their expense, and inasmuch as said Order of St. Benedict of New Jersey is an inhabitant of the District of New Jersey and the defendant Albert Steinhauser is an inhabitant of the State of Minnesota, this Court has no jurisdiction to entertain this amended bill, and the same should, therefore, be dismissed at the cost of the complainants.

7. Because there is no equity in complainants' bill or amended bill or in the case made or established by complainants under their proof.

8. Because it is contrary to equity and good conscience to permit complainants to maintain this action and said amended bill in equity, in view of the agreement or arrangement between the complainants and the Order of St. Benedict of New Jersey concerning

the maintenance and prosecution of this action and the defense of said action at law by Albert Steinhauser as administrator against Louis G. Benziger and Nicholas C. Benziger pending upon the law side of this Court.

9. Because complainants have failed to make out a case and have failed to prove and establish a case in accordance with the rules in equity and the decision of the Circuit Court of the United States.

205 10. The defendant renews its motion made at the opening of this case and moves to dismiss said amended bill for the reasons:

First. That no case is stated in or by said amended bill authorizing the Court to grant the relief sought, or any other relief.

Second. That it appears by complainants' own showing by the said amended bill that complainants are not entitled to the relief prayed by said amended bill against this defendant.

Third. That said amended bill of the complainants is wholly without equity.

Fourth. That it appears in and by said amended bill that the causes of complaint are stale, and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for a Court to take cognizance thereof, or to enforce any further or other answer thereto.

Fifth. That is appears by said amended bill that there are divers other persons who are necessary parties to said amended bill, but who are not made parties thereto. And in particular it appears, that the order or society called in said amended bill the Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania; the Abbey of St. Benedict in Kansas, and the Order of St. Benedict of New Jersey, and each one of them, is a necessary party to said amended bill, but the said Benedictine Society of St. Vincent's, Westmoreland County, Pennsylvania, the said Abbey of St. Benedict in Kansas, and the Order of St. Benedict of the State of New Jersey, are not made a party thereto.

Sixth. That said amended bill of complaint is exhibited against the defendant for several and distinct and independent matters and causes which have no relation to each other and in which, or, in the greater part of which, this defendant is in no way interested or concerned and ought not to be implicated.

Seventh. Because there is no equity in said amended bill, and said complainants have an adequate remedy at law.

Eighth. That it appears in and by said amended bill that more than six years, to wit, nine years and four months have elapsed since the alleged cause of complaint accrued, to said Order of St. Benedict of New Jersey, and more than six years, to wit, nine years and four months have elapsed since the alleged cause of com-

206 plaint accrued to complainants, or to any one of said orders or societies mentioned in said amended bill, whereby said cause of action and cause of complaint hath become barred by the Statute of Limitations, in such case made and provided.

Ninth. The Court has no jurisdiction of the subject matter of the

action, and the Probate Court of Brown County, Minnesota (together with the Circuit Court of the United States for the District of Minnesota, having concurrent jurisdiction, has exclusive jurisdiction of the subject matter of this action.

Tenth. That it appears in and by said amended bill that said complainants; said Order of St. Benedict of the State of New Jersey, nor any one of said societies mentioned in said amended bill, have not filed, or presented, a claim or demand to the Probate Court of Brown County, Minnesota, of and for their alleged claim and right to said books, copyrights, contract, moneys and property, as alleged by complainants in said amended bill, nor yet have said complainants, said orders, or any one of them, commenced a suit in the Circuit Court of the United States within and for the district of Minnesota (having concurrent jurisdiction) to establish, and make lawful, such claim, wherefore this Court has no jurisdiction.

Eleventh. It appears in and by said amended bill, that more than one year, to wit, more than three years have elapsed since the time of granting letters of administration, and the appointment of defendant as administrator of said estate of said Augustin Wirth, deceased, by said Probate Court of Brown County, State of Minnesota, and that the time fixed by said Probate Court and the Statutes of said State for complainant, said Order of St. Benedict of New Jersey, and all orders or societies named in said amended bill, and all creditors of said estate, to present and file their claims and demands, to said Probate Court, against said estate of Augustin Wirth, deceased, as required by the laws of the State of Minnesota and especially under Sections 4509, 4511 and 4514 of the General Statutes of the State of Minnesota, 1904, has expired whereby said cause of complaint hath become barred by the Statute of Limitations of Minnesota and by the laws of said State, in such case made and provided.

Adjourned sine die.

Examiner's Certificate.

Circuit Court of the United States, Southern District of New York.

207 LOUIS G. BENZIGER et al.
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, an Examiner, duly appointed by the Circuit Court of the United States, for the Southern District of New York,

Do Hereby Certify, that the foregoing are the proofs for final hearing taken before me in the above entitled cause on the part of the complainants, under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I Do Further Certify, that I am not of counsel nor attorney for

either of the parties nor in any wise interested in the event of the said cause.

I Further Certify, that Messrs. Arnold & Green, Frank W. Arnold and Frederick C. Gladden appeared on the part of complainants, and Mr. Chas. L. Burr, appeared on the part of defendant in the taking of said proofs.

JOHN A. SHIELDS, *Examiner.*

Endorsed: Filed Apr. 27, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the United States Circuit Court within and for the District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

In the United States Circuit Court within and for the Southern District of New York.

LOUIS G. BENZIGER and NICH-LAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

Deposition of the Witness Peter Engle, Taken on Behalf of the Defendant at the Office of James R. Bennett, Jr., in the City of St. Cloud, Stearns County, Minnesota, Before said James R. Bennett, Jr., as Notary Public in and for said Stearns County, upon May 21st, A. D. 1909, at 10 A. M., Pursuant to the Annexed Stipulations.

208 Appearances:

W. H. Pitzer, Esq., Nebraska City, Nebr. for Defendant.
Otto Kueffner, Esq. of St. Paul, Minnesota, for Complainants.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action by counsel now appearing, W. H. Pitzer of the firm of Pitzer & Hayward of Nebraska City, Nebraska, and Otto Kueffner of St. Paul, Minnesota, that the testimony of the witness Peter Engle taken at this time may be taken in shorthand by Ellen Freeberg and after the testimony is so taken it may then be transcribed into typewriting by her. That the signature of the witness to his testimony be and it is hereby waived and the testimony so taken and transcribed may be admitted in evidence in either of the above cases upon the certificate of James R. Bennett, Jr., the Notary taking the same.

PETER ENGLE, being called as a witness on behalf of the defendant, and being first duly sworn as hereinafter duly certified, testified as follows:

Direct examination.

By Mr. PITZER:

1 Q. You have already stated your name so will ask, where do you live?

A. At St. John's Abbey, Collegeville, Minn.

2 Q. In what work are you engaged?

A. Well, I am a superior of the Order of St. Benedict in Minnesota.

3 Q. You have an official position in the Abbey?

A. Well, yes, I am a superior of the Abbey. I am President of the Corporation, known as the Abbot and my position is for life.

4 Q. How long have you lived at St. Johns and held this position?

A. You meant from the first start?

5 Q. Yes.

A. Since September 1869 and have been Abbot since November 1894.

6 Q. St. John is in Stearns County?

A. Stearns County, yes.

7 Q. How far from St. Cloud?

A. Twelve miles.

8 Q. Were you acquainted with one Father Augustin Wirth in his life time?

A. I did not have an intimate acquaintance with him but I met him several times.

9 Q. Were you acquainted with him prior to the year 1898, that being the year when he came to Springfield, Minnesota?

209 A. That I do not recollect, that I met him personally before that. Think I did but could not recall that occasion am pretty sure I met him several times.

10 Q. You did me-t him though, Father, and during the time he was at Springfield?

A. I met him, think it was the summer before he died, think at St. Paul at our place there.

11 Q. Did you ever me-t him at Springfield, Minnesota?

A. Never.

12 Q. At your Abbey?

A. Do not recollect it, may be I did but could not say certain, think he was up there but am not certain, do not recollect having met him at the Abbey.

13 Q. Do you recall the time of Father Wirth's death in December, 1901?

A. Yes, quite well.

14 Q. Did you go to Springfield at that time?

A. I was asked by Abbot Hilary to go there but sent instead Father Timmothy Veath, who died some years ago.

15 Q. Where was Father Wirth buried?

A. Father Wirth was buried in St. John's Cemetery at Collegeville.

16 Q. In what way were you requested, by letter or by wire, to go to Springfield?

A. Think it was by letter, I am pretty sure.

17 Q. Do you have the letter still?

A. I kept most of letters of several years and may find it, but did not look it up at the present.

18 Q. Do you know how long before Father Wirth's death you received this letter, or request, from Father Hilary?

A. Well, about a week or two.

19 Q. Did Father Timmothy attend according to your request at Springfield, and did he reach there before the death of Father Wirth, do you know?

A. He did.

20 Q. Do you know how long before his death?

A. Only a few days, I think.

21 Q. The request made to you by Father Hilary by letter, as you say, was that request made for you to go to Springfield for any specific purpose or to do any particular service for Father Hilary?

A. Yes, sir.

22 Q. Will you upon your return see if you can find the letter from Father Hilary to which you have referred, and if you do find it will you forward it to the Notary here?

A. I will.

It is stipulated that the letter, if found, shall be attached to the depositions, the original to the deposition for filing at Mankato and a copy to the deposition for filing in New York. Mr. Kuefner reserves the right to object to the materiality of the letter at the time of the reading of depositions and the defendant reserving the right to offer the same in evidence or not to offer it, as may be determined from its contents.

210

23 Q. I would like to inquire in what way you gave Father Timmothy the request that you mentioned for him to go to Springfield, by letter or how, if you remember?

A. I think by letter. He was at Minneapolis at the time, but am not quite sure of that.

24 Q. Where was he at the time did you say?

A. At Minneapolis at the time.

25 Q. He is not now living?

A. No, sir. He was a member of the Order of St. Benedict.

26 Q. Was his membership with Abbey of St. Johns?

A. It was.

A. *He reported immediately after his visit, I think.* report to you as to his visit to Springfield, according to your request?

A. He reported immediately after his visit, I think.

28 Q. Would that be before his funeral?

A. I could not tell.

29 Q. In the request made of you by Father Hilary you were asked, were you, to take charge of Father Wirth's personal effects?

A. I was to see to his spiritual needs and his temporal affairs.

30 Q. Was this request you mention any more specific than the

language you have used? What I mean, is, were any specific directions given with reference to any property of any kind that might be by Father Wirth?

A. I think they were more specific than I said, but that was the intent of the letter.

31 Q. Did you give to Father Timmothy the same instructions or requests that Father Hilary had made of you?

A. I did.

32 Q. When Father Timmothy reported to you did he report in reference to any property?

A. He did.

33 Q. Had he taken charge of it while he was at Springfield?

A. He took charge of it.

34 Q. And what did he do with it?

A. He handed the documents to me.

35 Q. Was it the intent of your request to him that in the event of Father Wirth's death, that he take charge of all the temporal effects and property of Father Wirth?

A. As far as I remember it was.

211 36 Q. Did Father Timmothy report to you that he had done so; that is, that the property that he gave you was all the property or papers?

A. He did.

37 Q. And all the documents and papers that were to be found?

A. Yes, sir.

38 Q. Among the effects delivered to you by father Timmothy were there any monies?

A. I don't remember for certain whether he had any cash at the time or not. No, there was no money.

39 Q. Have you with you, now in your hands, some paper from which you can testify and give us a statement of what property or documents Father Timmothy then delivered to you?

A. I have not. Think I sent them to Abbot Hilary.

40 Q. Have you any memorandum of any kind in your possession here or at the Abbey from which you could give us a statement of what papers or documents then came into your hands from Father Timmothy?

A. I have not with me and am not sure if I have a copy of it at the Abbey. Father Timmothy had it in the statement.

41 Q. That was in the nature of what we would call an inventory of the property?

A. Yes, sir, an inventory of mortgages and notes.

42 Q. How long did these effects, these papers that Father Timmothy delivered to you, remain in your custody?

A. As near as I can tell from the time of Father Wirth's death [*is*] was September, 1903.

43 Q. And at that time what did you do with them?

A. I handed a part of them over to Mr. Kuefner and the rest I sent to Abbot Hilary to the best of my memory, then I had already sent some documents away but think there were no mortgages or notes, some letters *and* that kind.

44 Q. When you delivered the papers you say you delivered to Mr. Kuefner, did you take at that time a receipt for them?

A. I don't remember.

45 Q. At whose request did you deliver them to Mr. Kuefner?

A. Suppose at the request of Abbot Hilary because I had written to him about Mr. Kuefner, that he would be perhaps the man that he could entrust these matters to, and he told me to give him charge of the matter.

46 Q. Is the Mr. Kuefner you mention, Mr. Otto Kuefner who is present here today?

A. Yes, sir.

47 Q. Have you any memorandum, either a copy of the letter or list, either with you or at the Abbey from which you can tell us what papers or securities or other property you sent direct, as you say, to Father Hilary?

212 A. No, did not keep a list of that, have no list of what I sent to Abbot Hilary because they had no material value.

48 Q. What papers were they that you forwarded then, what was the nature of those papers sent to Father Hilary?

A. Am not sure, were some letters and some papers that he had received from Benziger Bros.

49 Q. Among the papers delivered to you there [—] a number of promissory notes running to Father Wirth and some mortgages, were there?

A. There were.

50 Q. Was there a mortgage among those papers and a note or notes which the mortgage secured on the Springfield Church or School property running to Elizabeth Quinn?

A. Yes sir.

51 Q. Was that sent to Father Hilary?

A. That was not sent to Abbot Hilary.

52 Q. To whom did you deliver that?

A. That was sent to the attorney of Miss Quinn.

53 Q. Mr. Meyer, do you remember?

A. Think that was the name.

54 Q. How long did you have the mortgage and notes in your possession?

A. Only a very short time.

55 Q. Were there some mortgages on St. Paul property and notes which the mortgages secured among the papers?

A. Yes, sir.

56 Q. Were there some unsecured notes?

A. Also.

57 Q. Were there some notes and mortgages securing them upon some property in New Jersey?

A. Not that I remember.

58 Q. You don't remember?

A. No.

59 Q. You have no memorandum from which you could refresh your memory?

A. No.

60 Q. The unsecured notes mentioned, are you able to tell us now

who they were made by and the amounts?

A. Could not very well do that from memory because there was quite a number and cannot say what was secured by mortgage or not, know that some were not secured.

61 Q. Do you recall there being among those papers three notes made by a party named Thomas Keough?

A. I do not remember.

62 Q. He being a resident of New Jersey?

A. Am not sure of that.

63 Q. Among the papers were there any documents to evidence copyright of his books?

A. There were some documents relative to that matter but do not remember their nature.

64 Q. Were the documents, as you remember, other than correspondence or letters?

213 A. It seems to me there were some documents other than correspondence.

65 Q. What was done with those documents, to whom did you deliver them?

A. I either delivered them to Mr. Kuefner or sent them to the Abbot.

66 Q. Was there, do you remember, a contract which purported to have been made between Father Wirth and Benziger Bros. relative to publication of his books?

A. I don't remember.

67 Q. When you return to the Abbey will you see whether you have among your papers any list or inventory, or memorandum, made at the time you received these papers or at the time you delivered them, and if you find any such record will you kindly forward it or an exact copy of it to the Notary here, that is if it is practicable?

A. Well, I will try to send them.

It is stipulated that *if* such inventory or memorandum, if found, shall be attached to the depositions, the original to the deposition for filing at Mankato and a copy to the depostion for filing in New York. Mr. Kuefner reserves the right to object to the materiality of the inventory or memorandum at the time of the reading of the depositions and the defendant reserving the right to offer the same in evidence or not to offer it, as may be determined from its contents.

68 Q. Father Engle, you say that no money was turned over to you by Father Timothy. Did you afterwards receive monies or checks or equivalent of monies?

A. Later on I received or collected monies.

69 Q. Have you an account of the monies that you received on account of the property or securities delivered to you by Father Timothy?

A. I have. I have a copy of statement, with me.

70 Q. This copy of statement which you have with you, did you make it yourself?

A. Written by myself.

71 Q. From what is it copied?

A. From our Ledger.

72 Q. Are the entries in your Ledger made by you?

A. Some may have been by me and some by our bookkeeper.

73 Q. Are you satisfied of their correspondence?

A. Fully. I am fully acquainted with those books because I kept them for a number of years myself. Every cent was accounted for that passed into my hands and out of my hands.

74 Q. Father Engle, the statement which you have just referred to being now marked "Defendants' Exhibit 1" shows the following disbursements by you: 1903, Feb. 17th, cash paid to Rt. Rev.
214 H. Pfraengle, $436.05, March 14th, $165, November 5th, $111.88, does this refer to the party you have mentioned as Father Hilary?

A. Yes, sir.

75 Q. In your statements which you made Abbot Hilary under date November 7th, 1903, appears an item "cash sent Anselmianum, March 14th, 1903, $165. Does that item correspond with any item in defendants' Exhibit "1"?

A. Cash sent to Anselmianum was sent to Rome to our International College.

76 Q. At whose request?

A. At the request of Abbot Hilary as being President of the Congregation I sent this money direct to Rome and charged it to Abbot Hilary. It is a Benedictine College and is supported by the different Monasteries of the Order.

77 Q. The other two items above mentioned of $436.05 and $111.88, were they sent direct to Father Hilary?.

A. They were.

78 Q. This statement, defendant's Exhibit "one" shows a footing of $1,450.32 of the items of disbursements while below under receipts, the footing is shown $1,357.82, and there is shown a balance due then of $2.50. Is there anything that you care to explain about the footing?

A. I only charged my expenses after no money was received by me and hence the account was overcharged.

79 Q. The items of receipts, several in number, in fact eleven, I believe, purporting to have been received from C. Ernst & Co., and principally interest payments, were those payments upon notes delivered you by Father Timmothy?

A. They were.

80 Q. There appears one entry, Jan. 19th, 1903, where both principal and interest were paid, $413.72, do you know what particular note that was?

A. I don't remember but can possibly find out from the books.

81 Q. Handing you defendant's Exhibit "2," are the written notations in that letter in your writing?

A. This is my writing.

82 Q. Can you tell by referring to the writing on Exhibit "2" what particular note this was that was paid in full?

A. Have no doubt it was the note of John R. Rickert?

83 Q. Was there another Rickert note, do you remember, and mortgage for $800?

A. It is probable.

84 Q. But you are not certain?

A. Not certain.

85 Q. This letter, defendant's Exhibit "2," which you have just examined, and also these letters numbered defendant's exhibits 3 to 21 inclusive, were those letters, except defendant's exhibit "2," among the papers Father Timmothy delivered to you?

215 A. I remember there were a number of letters like these among the documents but could not identify these.

86 Q. The letter, defendant's exhibit "2," however, you received yourself, did you?

A. I did.

87 Q. And the figures and memorandum in ink on the left and at the foot of the letter, is that in your hand-writing?

A. Yes, it is in my handwriting.

It is stipulated that the letters marked Exhibits "2" to "21" inclusive, were among the personal effects of Father Wirth and are genuine letters from the party from whom they purport to have been received. Defendant offers in evidence Defendant's exhibit "1" also Defendant's Exhibit "2" also Defendant's exhibit- "3" to "21" inclusive, and requests that the originals so offered be attached to the deposition for use in the action pending at Mankato and the copies thereof be attached to the deposition for use in the above case pending in New York.

Objected to on the part of plaintiff as incompetent, irrelevant and immaterial and not tending to prove any of the issues made by the pleadings.

Exhibit- "1" to "21" inclusive received, and originals attached hereto, and found at pages 19 to 41 inclusive.

88 Q. Shall ask you, Father Engle, if any books of account were delivered you by Father Timmothy?

A. No, sir.

89 Q. Were there any of his published books on hand, do you know?

A. Whatever books and personal effects were on hand were boxed and shipped to Newark, N. J. to Abbot Hilary.

90 Q. You refer to his library?

A. Library and clothing and things of that kind.

91 Q. You are familiar with church publications, Catholic publications, and know that Father Wirth was a writer or translator, did you not?

A. No.

92 Q. Did you, in your acquaintance with him ever discuss his literary work with him or he with you, or mention it?

A. I did not nor did he.

93 Q. He was engaged upon a work at the time of his last illness, was he not?

A. I don't know.

94 Q. Was there not among the papers delivered to you a manuscript of unfinished work or partly unfinished work?

A. There was no manuscript delivered.

95 Q. Was there any manuscript reported by Father Timmothy?

216 A. There was no manuscript reported, not to my memory.

96 Q. How large a package, or bundle, did the papers make that you forwarded to Father Hilary?

A. I don't recollect how large it was that I sent to Abbot Hilary.

97 Q. In what was the property which you received contained?

A. As far as I remember the contents was contained in about three documentary envelopes about one inch thick.

98 Q. Then none of Father Wirth's books or effects other than such papers as you have mentioned came into your possession?

A. No, sir.

99 Q. Do you recall whether any of the securities or notes which came into your hands were given or owing by Alfred McCahill of New Jersey?

A. I am not perfectly sure about this, but it seems to me the name occurs in some of the papers.

100 Q. I want to ask you with reference to defendant's Exhibit "22" whether you recognize that as any statement which has been in your hands before?

A. I do not recall having seen the document.

101 Q. Do you know then in whose hand writing the pencil marks are in this exhibit?

A. It certainly is not mine. Could not say whose it is.

102 Q. Father Engle, while you had in your possession the Springfield School mortgage to Elizabeth Quinn, did you receive any payments of money upon it?

A. I did not.

On Cross-Examination by Mr. Kuefner, witness, Father ENGLE, testifies as follows:

103 X Q. You stated that you knew Father Wirth in his life time and that you were Abbot of Abbey at St. John's member of O. S. B., was Father Wirth member of your Order?

Objected to by defendants on the ground that it was not proper cross-examination, no foundation laid and incompetent calling for conclusion of the witness.

A. He was.

104 X Q. From what time to what time?

Objected to by defendant on the ground that it is not proper cross-examination, no foundation laid and incompetent calling for conclusion of the witness.

A. I could not say exact time, could find it out. He must have been in the order for about forty years to the best of my recollection.

105 X Q. Was he a member at the time of his death?

217 Same objection as last above.

A. He was.

106 X Q. Do you say he was buried at St. John's Cemetery, does that mean at Collegeville, Minnesota where you are Abbott?

A. Yes, sir.

107 X Q. How did you happen to bury him there?

A. I was requested to do so by Father Hilary and because it was supposed to be the wish of Father Wirth expressed shortly before he died.

Defendant moves to strike out the last part of witness' answer to the supposition the same being incompetent and immaterial.

108 X Q. Was he buried in the habit of the Order of St. Benedict?

Same objection as first above named, and also immaterial.

A. He was to the best of my memory.

109 X Q. Who paid the funeral expenses?

A. The funeral expenses were advanced by me.

110 X Q. On whose behalf?

A. On Father Hilary's of the O. S. B.

111 X Q. The evidence here refers to a number of notes and mortgages given by Casper Ernst & Co. Do you know Casper Ernst?

A. I know him.

112 X Q. Where did he live?

A. At the time he resided at St. Paul.

113 X Q. Is that the same Casper Ernst who was afterwards found guilty of forgery?

A. Was the same.

114 X Q. And became a bankrupt?

A. The same.

115 X Q. And whose estate did not pay anything on the debts which he owed?

A. Yes, sir.

116 X Q. Father Engle, do you know of the vows which have been taken by the members of O. S. B.?

Defendants object as it is not proper examination.

A. I certainly do.

117 X Q. You also know about the rules of St. Benedict?

Same objection as last above named.

A. Certainly.

118 X Q. Are you also acquainted with the Canon ecclesiastical laws?

Same objection and also immaterial and incompetent.

A. Yes, sir.

218 119 X Q. What construction does the ecclesiastical Canon Law place upon the vows taken by the members of the Order

as to poverty, what is the meaning of stability and conversion of morals?

The defendant objects [—] not proper cross-examination, incompetent, immaterial and no foundation laid.

A. As to vow of poverty when this is solemnly made in religious order it incapacitates such a member to possess or acquire property for himself and to make independent use of temporal things which can be valued in money.

120 X Q. What education have you had relative to Canon and Ecclesiastical Laws?

A. Every Priest is supposed to study it and since I am Abbot I have often had occasion to make special study of these things.

121 X Q. Do you ever have occasion to apply it and construe it?

A. Sure.

122 X Q. Do you consider yourself an expert in that?

A. In these particular cases I think I am able to pass a correct judgment.

Redirect examination.

By Mr. PITZER:

123 R. Q. It was in the summer or was it the year prior to his death when you last saw Father Wirth?

A. I think it was in the summer before his death.

124 R. Q. The summer of 1901 his death occurring in December, 1901?

A. Yes, sir.

125 R. Q. On how many other occasions had you met him since he took up the work at St. Raphael's Church in Springfield, as nearly as you can tell us?

A. On one other occasion.

126 R. Q. For how long a time were you with Father Wirth on those two occasions?

A. From one-half hour to one hour.

127 R. Q. Prior to your meeting Father Wirth personally, you still had heard of him though, had you?

A. Very much.

128 R. Q. And you knew that he was a member of the Order of St. Benedict before you ever met him?

A. I did. He was one of the Pioneer Benedictine Priests in Minnesota having had charge of Parish in Mankato, East Minneapolis, then St. Anthony at that time.

129 R. Q. While [*had*] had charge of these parishes, or churches, that you mentioned, was he under the supervision or authority of yourself?

A. No.

130 R. Q. Any other Abbot?

A. Yes, sir.

131 R. Q. In Springfield, at his last work, was he there under your supervision or authority?

219 A. He was not under mine.

132 R. Q. Under any other Abbot?

A. Under Abbot Hilary.

133 R. Q. Was he there responsible to Abbot Hilary or Archbishop Ireland?

A. To both in a different way.

134 R. Q. In what way to Archbishop Ireland?

A. As to the management of the Parish of which he had charge.

135 R. Q. And that included the conduct of church services?

A. Yes, sir, and the financial matters of the Parish.

136 R. Q. The meaning you give above in answer to Mr. Kuefner's inquiry, you mean that as the construction of the Canon Law on this vow of poverty, do you?

A. I do.

137 R. Q. You say that incapacitates members from possessing property or temporal things whose value can be measured in money. Is that a well settled principle of your Canon Law?

A. Yes, sir. Whatever a Monk acquires he acquires for his Monastery.

138 R. Q. That, you say, incapacitates a member or Monk from holding property.

A. Yes, in his name and for himself.

Witness excused.

Mr. Pitzer here pays witness $2.50 mileage and fee.

DEFENDANT'S EX. 1.

Moneys Disbursed & Collected by Peter Engel for Rt. Rev. Hilary Pfraengle.

Disbursed:

1902.			
Jan. 21.	Cash	for Casket & Undertaker's bill	186.89
"	"	Grave & monument	28.00
"		Funeral Expenses in Collegeville	35.00
"	"	For bill of Geo. Ross	27.00
"	"	Cath. Augustin a/c services	25.
"	"	J. Neumaier "	25.
"	"	T. Vaeth, traveling & E.	10.
June 5.	"	Eliz Quinn Int. Collected by Rev. A. Wirth for her	210.00
Sept. 1.	"	to Dr. T. Sullivan for professional services to A. W.	150.00
1903.			
Feb. 17.	"	paid to Rt. Rev. H. Pfraengle	436.05
Mar. 14.	"	" " "	165.00
Nov. 5.	"	" " "	111.88
"		Traveling & Expenses & services of Peter Engel	40.50
			1,450.32

220 Receipts:

1902.			
Jan. 17.	Cash Interest from C. Ernst & Co.		28.00
"	" " " " Geo. Ross.		42.00
Apr. 4.	" " " " C. Ernst & Co.		57.75
9.	" from State Bank of Springfield.		2.10
May 7.	" Int. from C. Ernst & Co.		13.13
19.	" " "		160.00
June 7.	" " "		31.50
July 3.	" " "		7.87
Oct. 23.	" " "		57.75
Nov. 10.	" " "		232.62
1903.			
Jan. 19.	Cash Note & Int. from C. Ernst & Co.		413.72
Apr. 28.	" Int. " "		70.88
Sept. 8.	" " " "		209.00
			1,357.82
	Bal. due.		2.50

Peter Engel.

Copy of Statement rendered Albert Steinhauser Adm. of A. Wirth Estate.

19.

DEFENDANT'S EXHIBIT 2.

Cable Address "Ernest." Long Distance Telephone 1576.

C. Ernst & Co.,
Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Oct* 22*nd*, 1902.

Rt. Rev. Peter Engel, Collegeville, Minn.

DEAR FATHER: Enclosed please find our check for $57.75 the interest for September, interest was paid promptly. Mr. Rickert the party you hold a $400.00 mortgage from, wants to pay loan in full with interest up to next interest day. Kindly send us all papers you hold of Rickert for collection and as soon as paid we will forward amount. If you however wish to let us have amount for six months or one year, we will pay you 7% p. c. on amount for six months or one year.

With best regards we are,
Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

221 Steinfeld.
Sent Int. Coupon Apr. 7..... $13.13
8.75

$800.00 note
28.00 Interest
in Ernst
hands still
due Jan. 18th

Sent also Mort. note
of Jno. A. Rickert
$800
Int. due
June 20 28.00
Dec. 20 28

856.00

Send note and mortgage of John R. Rickert..... 400.00
Int. coupon John R. Rickert..... 14.00
" " Rud Steinfeld..... 13.11
" " Frank Kramer..... 17.15
Note of C. Ernst..... 160.00

604.27

(Endorsed on back of this letter:)
Sent Mar. 4. Coupons 8.75
17.50
31.50

57.75 20

DEF'T'S EX. 3.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *September 27th,* 1900.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Yours of the 25th inst. with draft for $1,700.00 is duly received. Enclosed please find Mtge. Note, Abstract and Fire Ins. of last loan, papers all properly executed and transferred to you with recourse to us, Abstract continued showing your Mtge. a first lien. The Remer Abstract will be ready by tomorrow, and as soon as returned to us, Abstract will be forwarded. The interest due on the Remer loan amounted to $2.67 when you bought loan, this amount you can pay now or we can deduct same when in-
222 terest becomes due. Trusting that you find everything satisfactory and thanking you for favor, we are,

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

21.

C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *September 29th*, 1900.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find Abstract of Remer continued up to date.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

22.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Nov. 6th*, 1900.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 5th inst. is duly received. We enclose here with Mtge. of Mielke duly recorded. We also enclose a few offerings for your inspection. We can invest any amount for you during this month. We have some Mtges. coming due the lat-er part of Nov. bearing 7% *per cent* which we can let you have. We also allow you 6% *per cent* on any amount left with us for investment in first Mtges, until money is invested at not less than 7% *p. c.* Trusting to hear from you by return mail we are, with best regards.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

223 (Endorsed on back of letter:)

500
400
250

11.50

23.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Nov. 10th*, 1900.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 8th inst. with check for $2,000.00 is duly received. We will invest amount in first Mtge. at not less than 7%. We are working at two loans we forwarded and as soon as papers are ready, they will be forwarded.

Why did you return the Mielke Mtge?

With best regards we are,

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

24.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Dec. 14th*, 1900.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 12th inst., is duly received. I returned from N. Y. City the 3rd inst., and have been busy to make up back work.

The two loans for $400.00 and $225.00 are ready, we are working on two more, one for $600.00 and one for $500.00 which will
224 be ready during next week. We enclose herewith offering of same.

With best regards, we are,

Yours truly,

CASPER ERNST.

(Dict.)

25

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Dec. 24th,* 1900.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor with check for $2,500.00 for investment is duly received. We will invest amount in first Mtge. at not less than 7% *p. c.* as soon as possible. With the compliments of the season we are,

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

26.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Jan. 14th,* 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your letter of the 12th inst. is received. With this mail we forward the following papers: The Mielke Mtge. of which you have all other papers. The Mtge. and Abstract of Sprunck, the Mtge. note, Fire Ins. and Abstract of Rickert papers all complete, the Mtge. Note, Fire Ins. and Abstract of Lunzer papers all complete and the Note, Fire Ins. and Abstract of Burke loan, the Mtge. of Burke loan is still on record and will be forwarded as soon as returned to us. All papers are transferred to you with the exception of Burke loan which is transferred to Elizabeth Quinn, as directed. All the Abstracts are continued showing all your Mtges.. first Mtges., against property loans are made on. and every one is first class. Should Miss Quinn ever wish to sell Mtge. again we take papers back as we have many inquiries for such loans. Loans were all ready some time ago. Before papers are returned to us, as is the case with Burke Mtge., which is still on record, it takes some time. As soon as we get in some good applications you will hear from us at once, in the meantime we al-

low you 6% on bal. still on hand for investment until invested. Trusting that you find things all satisfactory we are with best regards.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

27.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Mar. 2nd,* 190-.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find our check for $12.00 the interest for Feb'y. Interest was paid promptly. We hope to be able in a short time to invest balance we still hold from you for investment. We allow you however 6% *p. c.* on amount until invested in first Mtge. With best regards we are,

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

28.

C. Ernst & Co..
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *April 1st,* 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find our check for $49.00 the interest for March. Interest was paid promptly. We enclose herewith a few offerings for your inspection, all are first class.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

226

375
650
250
350

$1,625.00

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *April 15th,* 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find papers of Horvath loan for $250.00 papers are all complete also Abstract, Note and Fire Ins. of Steinfeld loan for $375.00. Papers are all transferred to you with recourse to us. The Horvath loan is dated March 28th and the Steinfeld loan April 11th, papers draw interest from above dates in your favor. Abstracts show your Mtges. the first and only liens against properties. The amount we still had from you was $1,925.00 less the amounts of enclosed loans $625.00 leaves a balance of $1,300.00 in your favor for investment. We will try our best to invest amount as soon as possible in first loans at not less than 7% *p. c.* The other two loans you selected we cannot forward, one was sold when we got your letter and the other one we were obliged to drop. Trusting that you find everything satisfactory we are with best regards,

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *June 15th,* 1901.

Rev. A. Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find our check for $50.85, the interest of May and June amounting to $50.85. Interest was paid promptly. You forwarded two coupons for Lunzer interest, one is only due in June 1902. You sent in two coupons of Lunzer, one for June 1901 and one for June 1902. You better attach coupon
227 for 1902 to principal note until due. We also enclose two loans one for $800.00 and one for $500 for amount we still

hold on hand from you. Interest on the two loans commences in May and June in your favor at 7% *p. c.* Both loans were owned by the deceased Rev. Father Verbeck of Holland, Wis. but in order to settle his estate we took loans back. We also enclose a few other offerings for your inspection.

Trusting that you find things all satisfactory we are with best wishes.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Aug. 9th,* 1901.

Rev. A. Wirth, Springfield, Minn.

REV. FATHER: Kindly send us all papers of Remer loan due the 10th of August. This loan will be paid in full next Monday. Kindly advise if we shall invest amount again or if we should forward principal and interest to your address and oblige.

We also enclose a few first Mtge. loan offerings for your inspection.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Aug. 12th,* 1901.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: Your favor with Remer Mtge. Note and coupon is duly received, also coupons for September. Coupon of Remer for $12.00 and September coupons amount to $69.75, you have figure same at $79.75.

Will you please look among your papers and see if you can find the Remer Abstract, as a rule we keep Abstracts of loans
228 in our office as we may need them from time to time, but Remer Abstract was forwarded to you with other papers.

You did not mention if we should invest the Remer Principal, or if we should forward amount. Loan was paid in full this afternoon.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Aug.* 14, 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 13th inst. is just received. We can let you have any of the loans you selected, and even a few more if you wish.

Your statement was all O. K. with the only exception that you omitted the Remer loan for $300.00 and one Rickert loan for $800.00, you hold two Rickert loans one for $400.00 and one for $800.00.

The amounts we received from you were $1,700.00, $2,000.00, $2,500.00 and $600.00 of Miss Quinn, or a total of $6,800.00 in loans you received $4,850.00 leaving a balance of $1,950.00, the Remer loan was paid in full making a total of $2,250.00 on hand now from you, as you will see by enclosed statement.

Kindly look up your loans and you will find one loan of Rickert for $800.00 and one for $400.00.

As stated alrealy, we can let you have any amount of loans now, and will keep loans amounting to $2,250.00 for you, or if you wish to take more now, kindly let us know.

We have not received the Remer Abstract yet, you sent us all other papers but Abstract, Abstract was sent to you Sept. 29th, 1900.

I will leave tomorrow evening for N. Y. City and will be back about Sept. 1st next when we will forward loans at once.

The Burke mortgage belonging to Miss Quinn will be forwarded also. Trusting that you find things all O. K. I am,

Yours truly,

CASPER ERNST.

(Dist. to G.)

34.

229 C. Ernst & Co.
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Sept. 27th,* 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 25th inst. is duly received. On August 14th, 1901, we answered your letter of August 13th. We also enclosed at that time a list of loans you hold from us, as you had omitted one Rickert loan for $800.00 and the Remer loan for $300.00 which has since been paid. We enclose again a list of loans you hold now, and amount we received from you and Miss Quinn which shows that we still hold a balance of $2,250.00 in your favor for investment. As long as this amount is not invested we pay you 6% *p. c.* on same. We never heard from you since we wrote you August 13th last, if our statement was right or not. Kindly let us hear from you by return mail and oblige.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

35.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Oct. 1st,* 1901.

Rev. Augustine Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 29th inst.; with check for $1,500.00 is duly received. We now hold from you for investment $3,750.00 in all. We are getting ready some loans for you, which will be forwarded in a few days. With best regards we are.

Yours truly,

C. ERNST & CO.,
Per GRACE.

(Dict.)

36.

230 C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Oct.* 12, 1901.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: This morning I have bought the Germania Bank Building, one of the finest office buildings in St. Paul. This building was built by the Germania Bank at a cost of $200,000 and since it has been occupied about $40,000 has been spent in improvements, and is as stated already, to-day one of the finest office buildings in St. Paul if not the finest. The Bank closed its doors in 1897 when we still had our offices in Building. In 1897 I bought the building where we are located now. The Germania Bank affairs have been in the hands of a receiver since 1897, and Bank Building had to be sold in order to settle with depositors of Bank. The ground on which building is situated is 50 x 100, 50 feet on Wabasha Street and 100 feet on Fifth Street, in the best part of St. Paul, opposite the Court House and Post Office. The Building to-day pays 6% *p. c.* on $150,000 and leaves a balance of over $7,000 net a year. The building is looked after at present by an agent, but hereafter will be cared for by myself, and within a year from now I will increase the rent 20% *p. c.* per annum. The price I paid for building is $136,000 net. The court allows 30 days from *to* date to examine papers and to close deal. Now I kindly ask of you to do me a personal favor, that is to let me have as much of your cash money as you can spare for one year or eighteen months (not less than one year) I am willing to pay you 8% *p. c.* for the time I use money, and give you my note with interest notes attached to same at the rate of 8% *p. c.* Interest payable every six months, just the same as on our Mtge. Notes. You will do me a great favor if you can let me have as much as you possibly can spare, and I assure you that I will take care of principal and interest when due. An opportunity to buy such property, at such a low price will not be offered so soon again, and with my management, I will be able to derive a great income out of same. Any amount you will be kind enough to let me have now or within twenty days (in thirty days from to-date I must close deal) I will forward Note for amount, properly signed with interest notes attached at the rate of 8% *p. c.*
Interest payable semi-annually by draft on Chicago or N. Y.
231 City. Trusting that you will look favorable upon proposition made, and thanking you in advance for kindness I remain.
Yours truly,

CASPER ERNST.

(Dict. to G.)

38.

C. Ernst & Co.,
Bankers.

Municipal and Railway Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Oct. 16th,* 1901.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 15th inst. is duly received. We hold from you including the August and September interest amounting to $69.75 and amount on hand for investment, $3,819.75 in all. Any amount you can let me have from now until Nov. 1st. with amount on hand already, I wil send you my note for same at the rate of 8% *p. c.* with interest notes attached, until paid in full. Thanking you again for favor I am with best regards,

Yours truly,

CASPER ERNST.

(Dict. to G.)

39.

C. Ernst & Co.,
Bankers.

Municipal and Railroad Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Oct. 19th,* 1901.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: Your favor of the 18th inst. with check for $180.20 is duly received. We enclose herewith Note for $4,000.00 for 18 months at 8% *p. c.* with interest notes attached. The Steinfeld interest for $13.12 for Oct. was not figured in the last statement, because we always forward interest for each month at the end of month. Interest was paid, which will be forwarded at the end of this month.

If you should have any more money to spare on or before
232 Nov. 10th next I will pay you 8% *p. c.* for the time I use money. Thanking you ever so much for favor, I am,

Yours truly,

CASPER ERNST.

(Dict. to G.)

DEF'T'S EX. 21.

40.

C. Ernst & Co.,
Bankers.

Municipal and Railroad Bonds.

Offices: Exchange Building, St. Paul; Temple Court, Minneapolis.

ST. PAUL, MINN., *Dec. 3rd,* 1901.

Rev. Aug. Wirth, Springfield, Minn.

REV. FATHER: Enclosed please find our check for $31.50, the interest for November. Interest was paid promptly.

Yours truly,

C. ERNST & CO.,
Per EVANS.

(Dict.)

41.

ST. JOHN'S ABBEY,
COLLEGEVILLE, MINN., *May* 31, 1909.

DEAR MR. BENNETT: I have been searching through my files for several hours this morning but found no trace of the letter of Abbott Hilary Pfraengle empowering me to take charge of the effects and papers of Rev. Aug. Wirth.

It is very probably that when I instructed Rev. Timothy Vaeth to act in my place I sent this letter of Abbott Hilary to him and he failed to return same.

I also regret not being able to find the list of Rev. Aug. Wirth's notes and mortgages.

I remain,

Yours very respectfully,

PETER ENGEL, *O. S. B.*,
Abbot.

I hereby certify that the above letter — received by me June 1st, 1909.

[SEAL.] JAMES R. BENNETT, JR.,
Notary Public, Minnesota.

42.

Circuit Court of the United States within and for the Southern District of New York.

233 In Equity.

LOUIS G. BENZIGER and Another, Plaintiffs,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

In the Circuit Court of the United States within and for the District of Minnesota, 2nd Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Plaintiff,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the second above entitled action that so much of the testimony taken in the first entitled action, by either party, as may be material to the issues of the second entitled action, may be introduced in evidence, read into and made a part of the record of the second entitled action, in the same manner and with the same force and effect as though said testimony had been taken in said second entitled action in conformity with the rules in equity and of the Circuit Court of the United States, within and for the District of Minnesota.

It is further stipulated and agreed that the objections taken or noted by either party to the testimony taken, offered or adduced, or any part thereof, in the first entitled action shall be recorded and noted, and shall be, objections to be considered by the Court in said second entitled action and that either party to said second entitled action may note, take or *or* reserve any further, other or different objections at the time of the offering or introduction of such evidence.

It is further hereby stipulated and agreed that in order to carry out the provisions and intent of this stipulation a copy of such testimony of the various witnesses either signed by the witnesses and sworn to, as true, before any person authorized to administer oaths; certified by the examiner taking such testimony or by the Clerk of the first above entitled action as a true copy of original or admitted to be a true copy of the original testimony by stipulation signed by Frank W. Arnold, Esq., on behalf of the complainant in the second above entitled action and by Charles L. Burr, Esq., on behalf of the

defendant in said action, may be read and received in evi-
234 dence pursuant to the first paragraph of this stipulation.
Dated, New York, March 30, 1909.

ALBERT SCHALLER,
Solicitor for Order of St. Benedict of New Jersey, Plaintiff.

____ ____,
Of Counsel for Order of St. Benedict of New Jersey.
PITZER & HAYWARD,
CHAS. L. BURR,
Solicitor for Albert Steinhauser, Administrator, etc.

To fees of Notary Public taking Depositions of which foregoing is copy:

To 97 Folios at 5 cts	$4.85
" Two copies for Counsel of respective parties	2.40
" Paid Express charges transmitting depositions	.50
Total	7.75

Received payment of Pitzer & Hayward.

JAMES R. BENNETT, JR.

STATE OF MINNESOTA,
County of Stearns, ss:

Be it Known, That I took the annexed deposition of Peter Engle, pursuant to the annexed stipulation. That I was then and there a Notary Public duly appointed and qualified to act as such within said State of Minnesota. That I exercised the power of that office in taking such deposition. That by virtue thereof I was then and there authorized to administer an oath. That the said witness, Peter Engle, before testifying was duly sworn to testify to the whole truth and nothing but the truth relative to the cause specified in said stipulation.

That the testimony of said witness was taken in the presence of the undersigned by Ellen Freeberg, a stenographer in the office of said James R. Bennett, Jr., in shorthand, and then by her transcribed into typewriting and pursuant to said stipulation.

That the signature of said witness to said deposition was expressly waived by said stipulation. That the examination was conducted on behalf of the defendant by W. H. Pitzer, Esq., from Nebraska City in the State of Nebraska, and on behalf of the complainant
235 herein by Otto Kuefner of the City of St. Paul, State of Minnesota.

That the reason for taking said deposition was that said witness resided more than thirty miles from the place of trial of said action.

That Exhibits No. "1" to No. "2" inclusive attached to said deposition are the original Exhibits and papers received and offered in evidence at the examination of said witness, Peter Engle. That

they are the same Exhibits which were then and there produced, identified, offered and received in evidence.

Witness my hand and seal this 21st day of May, A. D. 1909.

[SEAL.] JAMES R. BENNETT, JR.,
Notary Public, Minnesota.

My commission expires Sept. 7th, 1914.

Endorsed: Deposition of Peter Engle. Filed July 9, 1909. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

Circuit Court of the United States within and for the Southern District of New York.

In Equity.

LOUIS C. BENZIGER and Another, Plaintiffs,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

In the Circuit Court of the United States within and for the District of Minnesota, 2nd Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Plaintiff,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

Stipulation.

It is hereby Stipulated and Agreed, by and between the parties to the second above entitled action that so much of the testimony taken in the first entitled action, by either party, as may be material to the issues of the second entitled action, may be introduced in evidence; read into, and made a part of the record of the second entitled action, in the same manner and with the same force and effect as though said testimony had been taken in said second entitled action in conformity with the Rules in Equity and of the Circuit Court of the United States, within and for the District of Minnesota.

It is further Stipulated and Agreed that the objections taken or noted by either party to the testimony taken, offered or adduced, or any part thereof, in the first entitled action shall be re-
236 corded and noted, and shall be, objections to be considered by the Court in said second entitled action and that either party to said second entitled action may note, take or reserve any further, other or different objection at the time of the offering or introduction of such evidence.

It is further hereby Stipulated and Agreed that in order to carry out the provisions and intent of this stipulation a copy of such testimony of the various witnesses either signed by the witnesses and

sworn to, as true, before any person authorized to administer oaths; certified by the examiner taking such testimony or by the Clerk of the first above entitled action as a true copy of the original or admitted to be a true copy of the original testimony by stipulation signed by Frank W. Arnold, Esq., on behalf of the complainant in the second above entitled action, and by Charles L. Burr, Esq., on behalf of the defendant in said action, may be read and received in evidence pursuant to the first paragraph of this stipulation.

Dated, New York, March 30th, 1909.

ALBERT SCHALLER,
Solicitor for Order of St. Benedict of New Jersey, Plaintiff.
ARNOLD & GREENE,
Of Counsel for Order of St. Benedict of New Jersey.
CHAS. L. BURR,
Solicitor for Albert Steinhauser, Administrator, etc.

United States Circuit Court within and for the Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustine Wirth, Deceased, Defendant.

Stipulation.

NEW YORK, *May* 5, 1909.

It is hereby stipulated and agreed by and between the parties hereto that oral testimony of the following named witnesses may be taken before the official and at the times and places hereinafter named, by deposition, to-wit:

1. Witness, W. G. Hoerr; place, Mankato, Blue Earth County, Minnesota; *taken* official, Mamie Carlson, Deputy Clerk,
237 United States Circuit Court, District of Minnesota, at her office in Mankato, Minnesota; date of taking deposition, May 19, 1909, at ten o'clock in the forenoon.

2. Witnesses, George Ross, John Schmid, Albert Steinhauser the defendant; place, New Ulm, Brown County, Minnesota; taking official, Helen H. Schaefer, notary public, at the office of Albert Steinhauser, New Ulm, Minnesota; date of taking deposition May 20, 1909, at ten o'clock in the forenoon.

3. Witness, Peter Engle, place, St. Cloud, Sterns County, Minnesota, taking official James R. Bennett, Jr., notary public, at his office in St. Cloud, Minnesota, date of taking deposition, May 21, 1909 at ten o'clock in the forenoon.

If desired either party may enter an order to this effect upon this stipulation, without notice to the other.

(Signed) ARNOLD & GREENE,
Solicitor for Complainant.

(Signed) CHAS. L. BURR,
Solicitor for Defendant.

Circuit Court of the United States within and for the Southern District of New York.

In Equity.

LOUIS G. BENZIGER and Another, Plaintiffs,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

In the District Court of the United States within and for the District of Minnesota, 2nd Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Plaintiff,
against
ALBERT STEINHAUSER, as Administrator, etc., Defendant.

Stipulation.

The deposition of witnesses taken on behalf of the defendant in the above entitled cause at the law offices of Albert Steinhauser in the City of New Ulm, Brown County, Minnesota, before Helen H. Schaefer, a Notary Public in and for said Brown County, Minnesota, on May 20, 1909, pursuant to the annexed stipulation. Appearances: for the defendant, W. H. Pitzer of the firm Pitzer & Hayward of Nebraska City, Nebraska, and for the complainants Mr. Otto Kuefner, St. Paul, Minnesota.

238 It is stipulated that the testimony of the witnesses taken at this time may be taken in shorthand by the Notary Public Helen H. Schaefer and afterwards transcribed in typewriting, and also that the signatures so to the testimony taken by the witnesses be waived.

GEO. ROSS, being called and duly sworn as hereinafter certified, testified as follows:

Direct examination.

By Mr. PITZER:

D. Q. 1. Where do you live, Mr. Ross?
A. In the City of New Ulm, Brown County, Minnesota.
D. Q. 2. For how long have you resided here?
A. Two years and five months.
D. Q. 3. How old are you?
A. I am 55 years old.
D. Q. 4. What official position do you hold now?
A. Judge of Probate of Brown County, Minnesota.
D. Q. 5. For how long have you had that office?
A. Two years and four months, since the 8th day of January 1907.

D. Q. 6. As such official you have in your custody and keeping, have you, the records and files in the estate causes in your Court?

A. Yes sir.

D. Q. 7. Is there an estate cause now pending in your Court wherein administration proceedings are pending, upon the estate of one Augustine Wirth?

A. Yes sir.

D. Q. 8. Have you with you and can you now produce the Court files in that case?

A. Yes sir, I have it right here with me. (Witness produces file.)

D. Q, 9. The cause to which you refer is that the cause entitled "In the Matter of the Estate of Augustin Wirth, deceased?"

A. Yes sir.

D. Q. 10. According to the practice in your office, either according to rules established, or according to statute, do the endorsements upon the back of the various papers on file as produced, show the dates of filing, that is the date of the filing of each paper of the Probate Court of Brown County?

A. Yes sir.

D. Q. 11. Defendant offers in evidence from the files *pro*-produced by the witness, papers as follows:

No. 1: Petition for Letters of Administration:

Mr. KUEFNER: Objected to as incompetent, immaterial and not tending to prove any issues to this case.

239 STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

To the Probate Court in and for said County:

The Petition of Peter Engel of the Collegeville — in the County of Stearns and State of Minnesota, respectfully shows that Augustin Wirth who was, at the time of his death, a resident of the City of Springfield in the County of Brown and State of Minnesota, died on the 19 day of December A. D. 1901 at the City of Springfield County of Brown and State of Minnesota, leaving estate therein, and without leaving any last Will and Testament, to the knowledge, information or belief of your petitioner.

That the names, ages and residences of the heirs of said deceased, so far as known to your petitioner, are as follows:

Name.	Age.	Relationship.	Residence.

The names of the relatives are unknown. The deceased was a member of the Order of St. Benedict of New Jersey.

That the probable value of the personal estate is $4,000.00, and the probable value of the real property is none and its character is as follows:

First, Town or City property, improved, value $.....	None.
Second, Town or City property, unimproved, value $.....	
Third, Farm property, value $.....	
Fourth, Wild land, value $.....	

Your Petitioner Therefore Prays, that Letters of Administration of the estate of said intestate be granted to Otto Kuefner of the City of St. Paul, in the County of Ramsey, State of Minnesota.

Dated the 17 day of December A. D. 1903.

PETER ENGEL.

STATE OF MINNESOTA,
County of Ramsey, ss:

Peter Engel the person who made the foregoing petition, being duly sworn, says that the same is true, to — own knowledge,
240 except as to those matters stated on his information and belief, and as to those that he believes them to be true.

PETER ENGEL.

Subscribed and sworn to before me, this 17th day of December A. D. 1903.

[NOTARIAL SEAL.] OTTO KUEFNER,
Notary Public, Ramsey County, Minn.

Endorsed: No. 1. In Probate Court, County of Brown. In the Matter of the Estate of Augustin Wirth, Deceased. Petition for Letters of Administration. Filed this 23rd day of December A. D. 1903. S. A. George, Clerk of Probate.

Mr. KUEFFNER: It is understood and agreed to, that this objection may stand to all of the documents offered.

No. 2.

Order for Hearing.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court, Special Term, December 23, 1903.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

On Reading and filing the petition of Peter Engel of Collegeville, Stearns Co., Minn. representing among other things that Augustin Wirth late of Springfield, Minn. on the 19th day of December A. D. 1901, at Springfield Minn. died intestate, and being a resident of this county at the time of his death, leaving goods chattels and estate

within this County, and that the said petitioner is the Abbot of the Order of St. Benedict, that said deceased was a member of said Order and praying that administration of said estate be to Otto Kueffner granted:

It Is Ordered, that said petition be heard before the judge of this Court, on the 25th day of January A. D. 1904, at 10 o'clock A. M. at the office of the Judge of Probate in said County.

Ordered Further, that notice thereof be given to the heirs of said deceased, and to all persons interested, by publishing a copy of this order once in a week for three successive weeks prior to said day of hearing, in the Springfield Advance a weekly newspaper printed and published at Springfield in said County.

241 Dated at New Ulm, Minn. the 23rd day of December A. D. 1903.

By the Court:

S. A. GEORGE,
Judge of Probate.

[PROBATE COURT SEAL.]

Endorsed: No. 2. In Probate Court, Brown County. In the Matter of the Estate of Augustin Wirth, Deceased. Order for Hearing and Notice of Application for Appointment of Administrator. Filed this 23rd day of December, A. D. 1903. Recorded in Old Book of Letters page 334. S. A. George, Judge of Probate.

No. 3.

Printer's Affidavit.

Order for Hearing and Notice of Application for Appointment of Administration.

STATE OF MINNESOTA,
County of Brown, ss:

Probate Court, Special Term, December 23rd, 1903.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

On reading and filing the Petition of Peter Engle of Coilegeville, Stearns Co., Minn. representing among other things, that Augustin Wirth, late of Springfield, Minnesota, on the 19th day of December A. D. 1901, at Springfield, Minnesota, died intestate, and being a resident of this county at the time of his death, leaving goods, chattels and estate, within this county, and that the said petitioner is the Abbot of the Order of Saint Benedict, that said deceased was a member of said order, and praying that administration of said estate be to Otto Kueffner granted:

It is Ordered, that said petition be heard before the Judge of this Court, on the 25th day of January, A. D. 1904, at 10 o'clock A. M. at the office of the Judge of Probate in said county.

Ordered further, that notice thereof be given to the heirs of said deceased, and to all persons interested, by publishing a copy of this order once in each week for three successive weeks prior to said day of hearing, in the Springfield Advance a weekly newspaper printed and published at Springfield in said county.

242 Dated at New Ulm, Minn. the 23rd day of December A. D. 1903.

By the Court:

[SEAL.] S. A. GEORGE,
Judge of Probate.

Printer's Affidavit.

STATE OF MINNESOTA,
County of Brown, ss:

Came personally before me D. M. Wright and being duly sworn deposes and says that she now is and during all the time hereinafter mentioned has been the manager and printer of the Springfield Advance, a weekly newspaper printed and published in Springfield in said Brown County, on Thursday of each week, that she knows of her own knowledge that the printed Order for hearing and Notice of Application for Appointment of Administrator hereto attached, cut from the columns of said newspaper, was inserted, printed and published in said newspaper once in each week for three successive weeks, and that all of said publications were made in the English language. That said notice was first inserted, printed and published in said newspaper on Thursday, the 31st day of December 1903, and was printed and published therein on each and every Thursday thereafter until and including Thursday, the 14th day of January 1904; that during all the time aforesaid said newspaper was a collection of general and local news, comments and miscellaneous literary items, and regularly issued and published on Thursday of each week from a known office of publication, said office being equipped with the necessary materials and skilled workmen for producing the same, and has consisted of not less than four pages, of five columns or more to each page, each column not less than seventeen and three fourths inches in length and never made up wholly of patents, plates and advertisements, or either or any of them, and has not been substantially a duplicate of any other newspaper, and has been regularly delivered each week to more than two hundred and forty paid subscribers, and that said newspaper, composed and consisting as above set forth, was printed and published in the English language weekly, and generally circulated in the Village of Springfield, in Brown County, in said state, and also in said Brown County, for more than one year next preceding the date of the first publication of said notice. That the publisher of said newspaper prior to the date of the publication of said notice filed with the

243 County Auditor of said Brown County an affidavit setting forth the facts required by Section 2, of Chapter 33, of the Laws of the State of Minnesota, for the year 1893, and the amendments thereto.

D. M. WRIGHT.

Subscribed and sworn to before me this 19th day of January A. D. 1904.

[NOTARIAL SEAL.] ED. J. FERNHOLZ,
Notary Public, Brown County, Minnesota.

Endorsed: No. 3. In the Matter of the Estate of Augustin Wirth, Deceased. Printer's Affidavit. Filed Jan. 20, 1904. S. A. George, Judge of Probate.

No. 4.

Order for Adjournment.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court, Special Term, Held January 25th, 1904.

In re Petition for Appointment of Administrator.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

On the Application of W. H. Pitzer Atty. for Valentine Wirth et al. in the above entitled matter:

Ordered, That the hearing of the above matter be, and the same is hereby, adjourned to the 4th day of February 1904, at 10 o'clock A. M at the office of the Judge of Probate, in New Ulm in said county.

[SEAL.] S. A. GEORGE,
Judge of Probate.

Endorsed: No. 4. In Probate court. In the Matter of the Estate of Augustin Wirth, Deceased. Order for Adjournment. Filed May 25, 1904. S. A. George, Judge of Probate.

No. 5.

Objections.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

And now comes Valentine Wirth, Regina Weigand and Florian Wirth, heirs at law of said deceased by Lind & Steinhauser, their attorneys residing at New Ulm, Minn. and object to the ap-
244 pointment of an administrator herein on the ground that the petition for the appointment of an administrator made

by one Peter Engle does not set forth sufficient facts to confer jurisdiction in the Probate Court to proceed in the premises.

Dated Feb. 4, 1904.

VALENTINE WIRTH,
REGINA WEIGAND,
FLORIAN WIRTH,
By LIND & STEINHAUSER,
Their Att'ys.

Endorsements: No. 5. In the Matter of the Estate of Augustin Wirth, Deceased. Objections. Filed Feb. 4, 1904. S. A. George, Judge of Probate.

No. 6.

Petition.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

To the Probate Court of said County:

Now comes Valentine Wirth, Regina Weigand and Florian Wirth, the first two of Nebraska City, Nebraska, and the latter of Elizabeth, N. J., and object to the appointment of Otto Kueffner of the City of St. Paul as administrator of this estate, and respectfully show to the Court:

That Augustine Wirth, deceased, Valentine Wirth, Anna Marie Weigand and Franz Joseph Wirth were brothers and sisters, and children of Franz Wirth. That Franz Wirth is deceased. That Anne Marie Weigand, formerly Anne Marie Wirth, is now deceased, and that Regina Weigand is her only surviving child, and heir at law. That Franz Joseph Wirth is now deceased, and left as his only son and heir at law, Florian Wirth.

They further represent to the Court that Augustin Wirth was at the time of his death a resident of the Village of Springfield in the County of Brown and State of Minnesota. That he was a priest in the Catholic Church at that time and was unmarried. That he died upon the 19th day of December 1901 in Springfield in said county and state, leaving an estate therein and without leaving any last will and testament to the knowledge, information and belief of the undersigned petitioners.

245 That the deceased left no other brother than Valentine Wirth surviving him. And that no sister survives him. That the undersigned petitioners are the only heirs at law of the deceased and the only persons entitled to said estate.

That the ages of the said petitioners are as follows:

Valentine Wirth.....65 years
Regina Weigand.....49 "
Florian Wirth.....48 "

That said petitioners did not know until a few weeks ago, that there was any estate of the said Augustine Wirth left for distribution to them as heirs at law; and that their information at the present time is derived from the published notice of the application for the appointment of an administrator, made by one Peter Engle.

That to the best information of your petitioners the probable value of the personal estate of the said deceased is $4,000 and more, although the exact amount is to your petitioners unknown. That your petitioners know of no real property belonging to said estate, but are informed that the said deceased was at the time of his death possessed of an estate in inheritance in real property in Hennepin County in this state.

Your petitioners *before* pray that the petition for the appointment of Otto Kueffner as administrator of said estate be denied; and that letters of administration of the said estate of the said deceased be granted to Albert Steinhauser of the City of New Ulm in the County of Brown, State of Minnesota.

Dated this 1st day of February 1904 at Nebraska City, Nebraska.

VALENTINE WIRTH,
REGINA WEIGAND AND
FLORIAN WIRTH,
By W. H. PITZER, *Attorney.*

STATE OF NEBRASKA,
County of Otoe, ss:

Valentine Wirth and Regina Weigand and each being first duly sworn, on oath say: That they are the petitioners above named, and heirs at law of Augustine Wirth, deceased. That they have heard read the contents of the foregoing petition, and that the allegations therein contained are true as they verily believe.

VALENTINE WIRTH.
REGINA WEIGAND.

246 Subscribed and sworn to before me this 1st day of February 1904.

[SEAL.]

W. H. PITZER,
Notary Public.

Endorsed: No. 6. In the Matter of the Estate of Augustin Wirth, Deceased. Petition. Filed Febr. 4-1904. S. A. George, Judge of Probate.

No. 7.

Order Appointing Administrator.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court, Special Term, March 10, 1904.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

Pursuant to an order of this Court made in the above entitled matter on the 23rd day of December 1903, the petition of Peter Engel, that Letters of Administration upon said estate be granted to Otto Kueffner of St. Paul, Minn. was on the 25th day of January 1904, brought on to be heard and considered, the affidavit of B. M. Wright printer having been filed herein showing that the notice required to be given and published by said order, has been given and published as ordered. On said date fixed for hearing said petition at the request of W. H. Pitzer, Esq., as attorney for Valentine Wirth and other heirs at law of said deceased, the hearing in said matter was by the Order of this Court adjourned to the 4th day of February 1904 at 10 o'clock A. M. thereafter on said 4th day of February 1904 at 10 A. M. of said day the said matter was again brought on to be heard and considered—Otto Kueffner, Esq. of St. Paul and Jos. A. Eckstein of New Ulm appearing in behalf of the petitioner, and W. H. Pitzer, Esq. and Messrs Lind & Steinhauser appearing in behalf of Valentine Wirth, Regina Weigand and Florian Wirth heirs at law of said deceased, and through their attorneys filed objections to the appointment of an administrator herein on the ground that the said petition for the appointment of an administrator, made by the said Peter Engel does not set forth sufficient facts to confer jurisdiction of this court to proceed in the premises, and further through their attorneys filed a petition protesting against the appointment of Otto Kueffner, and praying for the appointment of Albert Steinhauser of New Ulm, as administrator of said estate.

And it appearing to the satisfaction of this Court, by competent proof, that the said Augustine Wirth died on the 19th day
247 of December A. D. 1901, at the Village of Springfield, Brown Co., Minn. intestate, and that he was a resident of said Brown County at the time of his death, and that said intestate left estate within said County to be administered upon, the probable value of which does not exceed the value of Four Thousand Dollars.

After duly considering the matter the Court finds—

First. That said Court has jurisdiction to proceed in the premises.

Second. That Valentine Wirth, Regina Weigand and Florian Wirth heirs at law of said deceased are entitled to select the administrator of said estate, and that Albert Steinhauser of New Ulm, Minn.

who has been nominated by said heirs at law as administrator is a suitable and competent person to administer upon said estate.

It is therefore Ordered that Albert Steinhauser of New Ulm, Minn. be and he is hereby appointed Administrator of the estate of Augustin Wirth, deceased, and that said Albert Steinhauser before entering upon his duties as such administrator, and before Letters of Administration be to him issued, give bond to the Judge of this Court in the sum of Six Thousand Dollars, with sufficient sureties to be approved by said Judge, conditioned according to law.

By the Court,

[SEAL.] S. A. GEORGE,
Judge of Probate.

Endorsed: No. 7. In the Matter of the Estate of Augustin Wirth, Deceased. Order. Filed March 10, 1904. S. A. George, Judge of Probate.

No. 10.

[Lectures] *of Administration.*

STATE OF MINNESOTA,
County of Brown, ss:

The State of Minnesota to all to whom these presents shall come or may concern, and especially to Albert Steinhauser, of New Ulm, Minn., Greeting:

Know Ye, That Whereas, Augustin Wirth, late of Springfield, Minn. deceased, lately died intestate at Brown County, Minnesota, having while he lived and at the time of his death, goods, chattels, rights, credits and estate within said Brown County, whereby the granting administration of all and singular the goods, chattels, rights, credits and estate of said deceased, and also the auditing, allowing and finally discharging the account thereof, is within the jurisdiction of the Probate Court of said County.

248 And Whereas Albert Steinhauser being entitled to the administration of said estate, has given bond to the Judge of said Court for the faithful execution of the trust of administrator of said estate, which said bond has been approved by said judge and filed in said Probate Court:

We, Therefore, Reposing full confidence in your integrity and ability, do by these presents constitute and appoint you the said Albert Steinhauser Administrator of all and singular the goods, chattels, rights, credits and estate of said deceased and do hereby authorize and empower you to take and have possession of all the real and personal estate of said deceased, and to receive the rents, issues and profits thereof until said estate shall have been settled, or until delivered over by order of said Court to the heirs of said deceased, and to demand, collect, recover and receive all and singular the debts, claims, demands, rights and choses in action, which to

the said deceased, while living and at the time of his death, did belong:

And Requiring You, to keep in good tenantable repair, all houses, buildings and fences on said real estate, which may and shall be under your control; and in accordance with your bond, approved and filed as aforesaid, *do* make and return into said Probate Court of said County, within three months, a true and perfect inventory of all the goods, chattels, rights, credits and estate of the said deceased, which shall come to your possession or knowledge, or to the possession of any other person for you, to administer, according to law, all the goods, chattels, rights, credits and estate of the said deceased, which shall at any time come to your possession or to the possession of any other person for you, and out of the same to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said Court; to render a just and true account of your administration to said court within one year, and at any other time when required by said court; and to perform all orders and decrees of said Court by you to be performed in the premises.

In Testimony Whereof, We have caused the seal of our Probate Court to be hereunto affixed: Witness the Hon. S. A. George, Judge of our said Probate Court, at New Ulm, in said County, this 16th day of March, A. D. 1904.

[SEAL.]

S. A. GEORGE,
Judge of Probate.

Endorsed: No. 10. In Probate Court. In the Matter of the Estate of Augustin Wirth, Deceased. Letters of Administra-
249 tion. Filed this 16th day of March, A. D. 1904, and re-ordered in Book C, of "Letters" on page 14. S. A. George, Judge of Probate.

No. 11.

Order Limiting Time to Pay Debts.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court, Special Term, March 16, 1904.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

Letters of Administration on said Estate being this day granted to Albert Steinhauser of New Ulm, Minn., it is ordered and by virtue and in pursuance of the statute in such case made and provided, this court doth hereby order that the said Administrator be, and he is hereby allowed eighteen months from and after the date hereof, for the settlement of the estate, and no longer, unless the

time above limited shall be extended by order of this court for cause shown.

Dated at New Ulm, Minn. the 16th day of March A. D. 1904.

By the Court,

[SEAL.] S. A. GEORGE,
Judge of Probate.

Endorsements: No. 11. In Probate Court of Brown. Augustin Wirth, Deceased. Order limiting time to pay Debts. Filed this 16 day of March A. D. 1904. Recorded in Book O of Orders, on page 131. S. A. George, Judge of Probate.

No. 12.

Order for Hearing on Claims.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court, Special Term, May 17, 1904.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

Letters of Administration *in* the estate of Augustin Wirth, deceased, late of the County of Brown and State of Minnesota, being granted to Albert Steinhauser.

It Is Ordered, that six months be, and the same is hereby allowed from and after the date of the order in which all persons having claims or demands against the said deceased are required to file the same in the Probate Court of said County, for examination and allowance, or be forever barred.

250 It Is Further Ordered, that the first Monday in December A. D. 1904, at 10 oclock A. M. at a General Term of said Probate Court, to be held at the Probate Office in the Court House in the City of New Ulm in said County, be and the same hereby is appointed as the time and place when and where the said Probate Court will examine and adjust said claims and demands.

And It Is Further Ordered, That notice of such Hearing be given to all creditors and persons interested in said estate by forthwith publishing this order once in each week for three successive weeks in the Springfield Advance, a weekly newspaper printed and published at Springfield in said County.

Dated at New Ulm, Minn. the 17th day of May A. D. 1904.

By the Court:

[SEAL.] S. A. GEORGE.

Endorsed: No. 12. In Probate Court, Brown County. In the Matter of the Estate of Augustin Wirth, Deceased. Order for Hearing on Claims. Filed this 17 day of May A. D. 1904. S. A. George, Judge of Probate.

No. 13.

General Inventory.

STATE OF MINNESOTA,
County of Brown, ss:

In Probate Court.

In the Matter of the Estate of AUGUSTIN WIRTH, Deceased.

A true inventory of all the real estate and of all the goods, chattels, rights, and credits of Augustin Wirth, deceased, which have come to the possession or knowledge of the undersigned, adminstrator of said estate.

5. All Mortgages, Bonds, Notes and other written Evidence of Debt.

Mortgage for $900.00 dated Sept. 15, 1900 given by Kate Sprunck widow, to Casper Ernst, and assigned to Augustin Wirth, due 5 years after date interest at rate of 7% per annum, interest paid to Sept. 15, 1903 Mortgages Lots 27, 28, 29 and 30 Block 21 A. Gotzian's Re-arrangement of Sigel's Addition to St. Paul. Mortgage for $250.00 dated March 28, 1901 given by Ignatz Horvath and wife to Casper Ernst and assigned to Augustin Wirth due 3 years after date, interest 7% paid to Sept. 28, 1903. Mortgages Lots 16 Block 1, Wallraff's Addition to St. Paul.

Mortgage for $475.00 dated Dec. 10, 1900 given by Michael Lunzer & wife to Casper Ernst and assigned to Augustin
251 Wirth, due 3 years after date, interest 7% pd. to June 10, 1903; Mortgages Lot 2 Block 4 of Rice Street Villas, Subdivisions of Lots 8, 12 and 13 and East 174 5/10 feet of Lot 11 Walcott's Addition to Cottage Homes.

Mortgage note for $375.00 dated April 11 1901, executed by Rudolph Steinfeld and wife to Casper Ernst and assigned to Augustin Wirth, due April 12, 1904, interest 7% pd. to Oct. 11, 1903. Mortgages Lot 2 Block 8 Cutter's Addition to Minneapolis.

6. All Other Personal Property.

Cash collected from Roberts Mortgage $1,060.00.

Dated at New Ulm this 13th day of June, 1904.

ALBERT STEINHAUSER,
Administrator of Estate of Augustin Wirth, Deceased.

STATE OF MINNESOTA,
County of Brown, ss:

Albert Steinhauser being duly affirmed on oath says that he is the administrator of the estate of Augustin Wirth late of said

County, deceased, and that the foregoing is a just and true inventory of all the real estate and of all the goods, chattels, rights and credits belonging to the said Augustin Wirth deceased, which have come to his possession or knowledge and that upon diligent inquiry he has not been able to discover any other property or estate belonging to the estate of said Augustin Wirth.

ALBERT STEINHAUSER,
Administrator.

Subscribed and affirmed to before me this 13 day of June, 1904.
[SEAL.] S. A. GEORGE,
Judge of Probate.

Endorsed: No. 13. In Probate Court. County of Brown. In the Matter of the Estate of Augustin Wirth, Deceased. General Inventory. Filed and approved this 14 day of June, 1904. S. A. George, Judge of Probate.

D. Q. 12. Judge Ross, have you examined the files and records in this estate proceeding with reference to whether or not any claims have been filed against this estate?

Mr. KUEFFNER: Same objection.

A. Claims filed against the estate is included.

252 D. Q. 13. The two claims to which you refer are the claims of Ernst Altermatt for $10.25, filed September 6, 1904, and the claim of the Springfield Advance for $3.25, filed January 20, 1904?

A. These claims were in the file when I took possession of the office.

D. Q. 14. Are there any other claims on file?

A. No, sir.

Mr. PITZER: It is agreed that the two claims mentioned, the one of Ernst Altermatt of $10.25 is for taking photographs May 31, 1901 and August 31, 1901, for church and school house; and the other of the Springfield Advance for $3.25 for subscription from September 2, 1899 to September 21, 1901.

D. Q. 15. Judge Ross you were formerly a resident of Springfield in this county, were you?

A. Yes sir.

D. Q. 16. During what years did you live there?

A. I was there from '86 to 1906.

D. Q. 17. During that time, in particular during the year 1899 had you any official connection with St. Raphael's Church or the parochial School of that Church?

A. Yes sir.

D. Q. 18. What relation or connection did you bear at that time?

A. I was one of the trustees of the church.

D. Q. 19. How many trustees were there?

A. Two from the parish besides the priest.

D. Q. 20. Did the two trustees and the priest constitute the managing board?

A. Yes sir.

D. Q. 21. And as such trustee did you have any particular duties in reference to raising funds?

A. Yes sir.

D. Q. 22. Do you remember the matter of the giving of a mortgage upon the school property therein in the year 1899.

Mr. KUEFFNER: I object to that as incompetent, irrelevant and immaterial and not tending to prove any issues in the pleadings.

A. Yes.

[D. Q. 23.] For what purpose was the mortgage given?

A. It was given for to pay the payment on the contract for building the school house.

Mr. KUEFFNER: Same objection.

D. Q. 24. By the giving of a mortgage a loan was secured; is that right?

A. Yes.

D. Q. 25. I think, Judge, you can probably state better than I can ask you questions, the transactions in reference to the giving of the mortgage mentioned, in 1899, upon the school or church
253 property at Springfield, for the purpose of obtaining the money for the payment of the school.

Mr. KUEFFNER: Objected to as incompetent, irrelevant and not tending to prove any issue in the pleadings, and it does not necessarily follow that the Order of St. Benedict knew of anything of this kind, and that they can veritably affect or change the contract between the Order of St. Benedict and the Church by any action done by Augustin Wirth without the knowledge or consent of the Order of St. Benedict, meaning the plaintiff Order of St. Benedict in the action pending in this court in the State of Minnesota.

A. If I should tell that I would have to start from the starting point——

D. Q. 26. How much money did you need to complete your contract?

A. About $3,500.00.

D. Q. 27. Was that the amount of the loan that was made?

A. Yes sir.

Mr. KUEFFNER: It is understood that the same objection above made applies to each question.

D. Q. 28. Now tell us how you raised this money, this $3,500.00 to complete your contract?

A. When the last payment became due for the $3,500.00 Father Wirth made a loan.

D. Q. 29. Did you give a note, or notes and mortgage?

A. Yes, there were three notes and a mortgage.

D. Q. 30. To whom *they were* given?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and imma-

terial, and, besides not being the best evidence, the mortgage itself being the best evidence.

A. Elizabeth Quinn.

D. Q. 31. Did you make out more than one mortgage at that time?

A. Yes.

D .Q. 32. Tell us the circumstances connected with the other mortgage to which you refer?

A. The first mortgage that you refer to was made payable to Valentine Wirth.

D. Q. 33. At whose request was it made in that way?

Mr. KUEFFNER: Same objection to all these questions.

A. At the request of Augustine Wirth.

D. Q. 34. The note or notes and mortgage to Valentine Wirth, were they executed, that is signed by you as trustee?

A. Of course the priest is Vice-President of the parish and the Secretary, these are the two parties who sign notes, and my signature did not appear on any of the papers.

254 D. Q. 35. You saw the papers?

A. Yes, I did.

D. Q. 36. What was done with them?

A. When the notes and mortgage were signed they were delivered to Augustin Wirth, and in about a week he called up the church committee again, and he requested that that mortgage should be changed to Elizabeth Quinn.

A. No, I did not.

D. Q. 36½. Did you know or did he tell you who Valentine Wirth was?

A. Yes sir.

D. Q. 37. Who was he?

A. Valentine Wirth?

D. Q. 38. Yes.

A. That was the brother of Augustin Wirth.

D. Q. 39. Following this was the mortgage made to Elizabeth Quinn?

A. Yes sir.

D. Q. 40. Was the mortgage changed or a new mortgage made?

A. A new mortgage was made.

D. Q. 41. What was done with the old one, do you know?

A. That was burned up.

D. Q. 42. Do you know Elizabeth Quinn?

A. I do not.

D. Q. 43. Did you ever?

A. I do not.

D. Q. 44. Did you at that time receive any information as to who she was?

Objected to as incompetent, irrelevant and immaterial, and the witness just stated that he did not know anything about Elizabeth Quinn.

A. No, I did not.

D. Q. 45. Was any reason given by Father Wirth at that time for desiring the change in these securities?
A. Yes sir.
D. Q. 46. What was it?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial.

D. Q. 47. Can you recall?
A. He said there might some trouble arise on account of it being made in the name of his brother.
D. Q. 48. That was all?
A. That was all he said.
D. Q. 49. The money for which this mortgage was given, did it pass into your hands as Treasurer or Trustee, or come into your possession?
[—.] Yes, it did.
D. Q. 50. In what form was it paid you, state if you remember?
A. I think it was in checks.
D. Q. 51. Checks drawn by whom?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and no proper foundation laid, and the checks itself would be the best evidence.

A. Rev. Augustin Wirth.
D. Q. 51. Do you know upon what bank or banks?
255 A. That I could not say for sure, but I think the State Bank of Springfield, if I remember right—probably one bank at Mankato—it is so long ago.
D. Q. 52. When the Elizabeth Quinn mortgage and the three notes you mention were made out, into whose possession were they delivered?
A. Rev. Augustin Wirth.
D. Q. 53. Did you see them afterwards?
A. You mean afterwards, when?
D. Q. 54. Well, has the mortgage been paid?
A. I think it has been paid; since I was not trustee of the church anymore, the last has been paid.
D. Q. 55. Do you know Peter Engel?
A. He is Abbot, is he not, at Collegeville, Minnesota?
D. Q. 56. Did you ever meet Father Engel; is that the proper way to designate him?
A. I think Abbot.
D. Q. 57. Did you ever meet Father Engel and talk with him regarding the Augustin Wirth estate or property?
A. Yes.
D. Q. 58. In Springfield?
A. Not in Springfield.
D. Q. 59. Where?
A. Up at Collegeville.
D. Q. 60. When was that?
A. That was on the 24th of January 1902.

D. Q. 61. And at that time was there anything said about the Quinn notes and mortgage?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial.

A. Yes.
D. Q. 62. What was it?
A. Father Engel asked me and said among the papers of Augustin Wirth was a mortgage and notes in favor of Elizabeth Quinn.
D. Q. 63. Did Father Engel show them to you?
A. Yes.
D. Q. 64. He had them then at that time in his possession?
A. Yes, he had them in his possession.
D. Q. 65. Did Father Engel make any statements as to other papers that were among the papers of Augustine Wirth?

Mr. KUEFFNER: Same objection.

A. Not that I remember.
D. Q. 66. What if anything, was said by him with reference to the value of the estate property?
A. Well, I do not remember that.
D. Q. 67. Was the question discussed Judge?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and the witness just testified that he did not remember what took place. (No answer.)

256 D. Q. 68. You remember whether it was discussed?
A. About his estate?
D. Q. 69. Yes.
A. No, I do not think it was.
D. Q. 70. It was not?
A. No, only about the Quinn mortgage.
D. Q. 71. Were you in Springfield 1901?
A. Yes.
D. Q. 72. Then you were there when Father Wirth died?
A. Yes sir.
D. Q. 73. You are the same George Ross, are you not to whom reimbursement payment was made for funeral expenses incurred in Father Wirth's funeral and burial?
A. Yes sir.
D. Q. 74. And on that account you gave a receipt, did you not, to Father Engel, or do you remember——
A. No, I do not remember.
D. Q. 75. To refresh your memory on the occasion of your visit in January 24, 1902 to Collegeville, at that time you spoke of having talked with Father Engel. I ask you whether you at that time and while there at Collegeville, [given] Father Engle a receipt in this form? (reads)

COLLEGEVILLE, MINNESOTA, *January* 24, 1902.

Received from Father Engel One hundred and eighty-six and 89/100 Dollars in full of expenses, Funeral etc. account of Rev. Augustin Wirth.

(Signed) GEO. ROSS.

A. Hm—hm——

D. Q. 76. You recall that now?

—. Well, I could not say that I signed that receipt, but he paid me for the funeral expenses.

D. Q. 77. At that time?

A. Yes.

D. Q. 78. Did you know who took possession of Father Wirth's private and personal effects at the time of his death?

A. Yes, it was told me so—he told me so himself—Father Timothy of Minneapolis.

D. Q. 79. That is, Father Timmothy told you that he himself had taken possession of his personal effects?

A. Yes sir.

D. Q. 80. Were you acquainted with Father Wirth before he came to Springfield in 1898?

A. I was not.

D. Q. 81. You had never seen him before?

A. No sir.

D. Q. 82. While he was at Springfield, do you remember whether or not he did other work besides his church work?

A. He did a lot of writing in his office.

D. Q. 83. Writing of what nature, do you know?

A. I could not say.

D. Q. 84. Did he carry on his church work?

A. Yes, he did.

257 D. Q. 85. This school that you spoke of, did Father Wirth have any part in this work?

A. Yes.

D. Q. 86. What did he do?

A. He was one of the officers.

D. Q. 87. So that in addition to his ordinary work as a priest he performed——

A. Why sure.

D. Q. 88. What was that school; what is called and known as a parochial school?

A. Yes sir.

D. Q. 89. By whose authority was it built?

A. By Archbishop Ireland.

D. Q. 90. Was it necessary to submit the matter of building the school to him?

A. Yes Sir.

D. Q. 91. The matter of obtaining his permission or authority, was that taken up by Father Wirth?

A. Yes Sir.

D. Q. 92. Was Father Wirth then under Archbishop Ireland's authority or direction.

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and the witness has not shown any knowledge sufficient to answer that question, and no foundation laid.

A. I think as far as he was Priest of St. Raphael's church.

D. Q. 93. In his church work then he was under Archbishop Ireland's direction?

A. Yes, that was the question.

D. Q. 94. I will ask you to state how you know this; did you learn it in performing your duties as trustee or as a member of the church?

A. Yes, as trustee.

Cross-examination.

By Mr. KUEFFNER:

X Q. *94*. Judge Ross, you stated that you took charge of the funeral, and your funeral expenses were paid back by Father Engel; at whose request did you take charge of the funeral?

A. Father Timothy's.

X Q. 96. Who was Father Timothy?

A. He belonged to the Order of St. Benedict.

X Q. 97. And did Augustin Wirth belong to the same order?

A. Well, that was what Father Timothy said; there was an assistant priest there to instruct us what steps to take and what dress to put on him.

X Q. 98. As far as you know Father Wirth was a member of the Order of St. Benedict?

A. As far as I can say,—I can not say that he was or was not. Of course I——

X Q. 99. What funeral garb did they put on Father Wirth?

258 A. What is directed by the Order of St. Benedict in the way they should be clothed.

X Q. 100. Then he was clothed in the robes of the Order of St. Benedict?

A. Yes.

X Q. 101. Then you do not know anything about the works of the Order of St. Benedict except that they wear certain robes?

A. Yes.

X Q. 102. Father Engel paid you back the money that you spent for the funeral?

A. Yes sir.

X Q. 103. Was Father Engel a member of the Order of St. Benedict?

A. I could not say, but he is the Abbot of the Order at Collegeville.

X Q. 104. Well, that is one of the Order of St. Benedict?

A. Yes sir.

X Q. 105. You speak of an assistant priest; was that Father Timothy?

A. No, that was Father Havorka.

X Q. 106. Was he a member of the Order of St. Benedict?
A. No sir.
X Q. 107. Not that you know?
A. No.
X Q. 108. Well, but Father Timothy was a member of the Order of St. Benedict?
A. Yes, he was.

Redirect examination.

By Mr. PITZER:

R. D. Q. 109. Father Timothy, as I understand, was sent there by Father Engel to take charge of the funeral?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and he has not shown any knowledge that he knew.

R. D. Q. 110. Did Father Timothy live at Springfield?
A. He lived at Minneapolis.
R. D. Q. 111. When did he come there?
A. He came there the day,—I could not say,—it was either a day or two before he died, but Father Wirth was unconscious when he came.
R. D. Q. 112. Then all directions regarding the funeral and burial were given you by Father Timothy?
A. Yes sir.
R. D. Q. 113. Father Wirth made no specific requests that you know?
A. He was unconscious for several days.
R. D. Q. 114. Then the clothing of Father Wirth in these clothes was not at Father Wirth's personal request?
(No answer.)
R. D. Q. 115. You said a moment ago that the funeral directions were under the charge of Father Timothy; that is, the direc-
259 tions as to the burial were given by Father Timothy; had Father Wirth made any request or given you any directions regarding his funeral?
A. No, he did not.
R. D. Q. 116. How long was he ill before he died?
A. About eight or ten weeks; eight weeks.
R. D. Q. 117. What was his illness, Pneumonia?
A. No, Dropsy.
R. D. Q. 118. Was he confined to his bed?
A. The last three or four weeks.
R. D. Q. 119. Did you visit him occasionally?
A. Visited him daily.
R. D. Q. 120. In connection with the source of his authority, and under whose direction he was acting in his work, was the Order of St. Benedict ever mentioned between you and him in your conversation at any time?
A. Never talked to me——

R. D. Q. 121. You mean that the Order of St. Benedict was never mentioned by him in any conversation you had with him?

A. Yes, there was.

R. D. Q. 122. On more than one occasion?

A. That I could not remember.

R. D. Q. 123. Was it mentioned by him as a- order with which he was connected or had been connected in any way?

A. Yes.

R. D. Q. 124. You remember when it was talked about.

—. It was in 1898 when he came there.

R. D. Q. 125. When he first came there?

A. Yes.

R. D. Q. 126. Will you tell us what it was that he said?

A. He said that he was sent here by Archbishop Ireland to take charge of the parish at Springfield.

R. D. Q. 127. Sent by whom?

A. By Archbishop Ireland.

R. D. Q. 128. He told you that?

A. Yes, he told me that.

R. D. Q. 129. He told you that or the people of the church?

A. He called us up to the house and told us who he was, and that he was sent by Archbishop Ireland.

R. D. Q. 130. At that time, did he mention the order of St. Benedict?

A. Yes, he did.

R. D. Q. 131. In what way did he mention it, or what did he say; as nearly as you can remember.

A. If I remember right, he said by the request of the Archbishop Ireland he came back to Minnesota again, but that he belonged to the Order of St. Benedict?

R. D. Q. 132. That is the only time that you recall——

A. That is the only time.

260 Recross-examination.

By Mr. KUEFFNER:

R. X Q. 133. You say that was the only time that he said he was a member of the Order of St. Benedict?

A. Yes.

R. X Q. 134. Did he at any time give you any writing or any checks where he signed "O. S. B.", meaning the Order of St. Benedict?

A. Yes.

[R. X Q. 134.] Have you such papers with you?

[—.] I have some papers with me.

(Witness produces paper marked Exhibit "1".)

R. X Q. 135. Is this in the writing of Augustine Wirth?

A. Yes.

R. X Q. 136. And the words "O. S. B." are in the handwriting of Augustine Wirth.

Mr. PITZER: Objected to as incompetent and immaterial.

A. Yes.

Mr. KUEFFNER: Plaintiff produces in evidence Exhibit "1."

R. X Q. 137. Was this paper, Exhibit "1" given to you *on* or about the time it was dated, January 2, 1900?
A. Yes sir.
R. X Q. 138. Have you any other papers in your possession that Augustine Wirth signed himself as O. S. B.?

Mr. PITZER: Same objection.

A. Yes.
R. X Q. 139. What are they?
A. Well, here is a financial report made by him at the end of the year. (Witness produces reports.)
R. X Q. 140. In two reports, one made Jan. 1, 1900 to Jan. 1, 1901, and the other from Jan. 1, 1899 to Jan. 1, 1900 he signed himself as Reverend Augustine Wirth, O. S. B.?
A. You see the originals of these reports were in writing, but these copies are printed by the church and were distributed by the parish.

Mr. KUEFFNER: We offer in evidence Exhibits 2 and 3.
Mr. PITZER: We object to Exhibits 2 and 3 in evidence.

R. X Q. 141. Now, Judge Ross, you said Rev. Wirth was buried in the robes of the Order of St. Benedict; where did you get these robes?
A. They were hanging there in the closet in the room.
R. X Q. 142. Did Rev. Wirth ever speak to you about these robes in his lifetime.

Mr. PITZER: Objected to as immaterial.

A. Yes he did.
261 R. X Q. 143. What did he say in regard to these robes, when was it?
A. I could not say; it was during the time he was stationed there as priest. He said that is the suit that I got to wear when I die.
R. X Q. 144. Do you remember, did he speak in German or English?
A. In German.
R. X Q. 145. He said that is the suit that he would wear when he would die?
A. Yes sir.
R. X Q. 146. Did he tell you, you should put it on to him if he would die?
A. No, he did not.
R. X Q. 147. And when he did die, you put on him that suit?
A. No, the undertaker did.
R. X Q. 148. And you helped him?
A. I did not help put him in the casket.

Redirect examination.

By Mr. PITZER:

R. D. Q. 149. The papers that you present here, Plaintiff's exhibits 1, 2 and 3, you found these papers among your private papers, did you?

A. I found them; I had some church papers, and I found them in the envelope with them.

R. D. Q. 150. In your possession?

A. Yes.

R. D. Q. 151. When did you find them?

A. I had them always with my papers.

R. D. Q. 152. Yes, but you brought them here in the small envelope which you now hold in your hand, and when did you find these papers and get them together?

A. O, I looked them over at different times.

[R. D. Q. 152.] And you brought them here at the request of Mr. Kueffner?

A. No sir.

[R. D. Q. 152.] You have known Mr. Steinhauser several years, have you?

A. Yes sir.

R. D. Q. 153. You talked with Mr. Steinhauser and your acquaintance with him at Springfield, did you not?

[—.] Yes sir.

R. D. Q. 154. That was several years ago now?

A. Yes.

R. D. Q. 155. That was shortly after Mr. Steinhauser was appointed administrator.

A. Yes.

R. D. Q. 156. And it was Mr. Steinhauser's business to inquire into the estate affairs of Father Wirth, was it not; in that conversation did you not tell Mr. Steinhauser that Father Wirth was not a member of the Order of St. Benedict?

Mr. KUEFFNER: Objected to as incompetent and immaterial and the defendant can not cross-examine and contradict his own witness.

262 A. I can not remember.

R. D. Q. 157. You remember of having a conversation with Mr. Steinhauser?

A. I do.

R. D. Q. 158. You would not say,—what I mean is, you can not remember whether you told Mr. Steinhauser that Father Wirth had told you, that he was not any longer a member of the Order of St. Benedict?

[—.] I could not say whether I did or not.

It is hereby stipulated that Plaintiff's Exhibit "2" is a financial report of the Church of St. Raphael's of Springfield, Minnesota, dated from January, 1, 1899 to January 1, 1900 and signed: Chas. Gamble, Secretary; Rev. Augustine Wirth, O. S. B. Pastor, and

Geo. Ross, Treasurer. Exhibit "3" is a financial report of the Church of St. Raphael of Springfield, Minnesota, from January 1, 1900 to January 1, 1901, showing the receipts and expenditures of the church and signed at the bottom as follows: We have carefully examined this financial statement and find it correct. Augustine Wirth, O. S. B., Pastor; Geo. Ross, Treasurer, and Charles Gamble, Secretary; and also showing Christmas collection 1900 St. Raphael's Church, Springfield, Minnesota, signed: Chas. Gamble, Geo. Ross, Trustees, Rev. Augustine Wirth, O. S. B.

Mr. JOHN SCHMID sworn.

Direct examination.

By Mr. PITZER:

D. Q. 159. Where do you live Mr. Schmid?
[—.] At Springfield, Minnesota.
D. Q. 160. How old are you?
A. 35.
D. Q. 161. What distance did you travel to come here?
A. About 30 miles.
D. Q. 162. How long have you lived at Springfield?
A. For the past 18 years.
D. Q. 163. In what business are you engaged there?
A. In the banking business.
D. Q. 164. In what bank?
A. State Bank of Springfield.
[D. Q. 164.] How long have you been engaged in that bank?
A. For the past seventeen years.
D. Q. 165. In what capacity?
A. As bookkeeper and Assistant Cashier.
D. Q. 166. How long have you been Assistant Cashier?
A. For the past ten years.
D. Q. 167. Were you formerly acquainted with Father Wirth?
A. I was.
D. Q. 168. For how long a time were you acquainted with him?
[—.] O, for in the neighborhood of two years.
D. Q. 169. Did your acquaintance with him begin upon his arrival in the summer or fall of 1899?
A. In that neighborhood.
263 D. Q. 170. And extend to the time of his death?
A. Yes.
D. Q. 171. Did you have, or your bank have any business relations with Father Wirth?
A. We did.
D. Q. 172. Of what nature?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and not the best evidence and not tending to prove any issues in the pleadings.

A. He kept a checking account with us.
D. Q. 173. In whose name?

A. In his name.

D. Q. 174. In the course of his accounting as it run, what would Father Wirth do in connection with it?

Mr. KUEFFNER: Same objection.

A. He would deposit cash, bills of exchange, place to his credit and check against his account; he occasionally bought drafts.

D. Q. 175. The drafts that you mention, they would finally be returned to you—to your bank?

A. Yes, sir.

D. Q. 176. Have you at our request examined among the papers of the bank the drafts purchased by Father Wirth to ascertain whether or not there was any exchange from your bank sent to the complainant, the Order of St. Benedict?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and not the best evidence, and not sufficient foundation laid for this testimony.

A. I have.

D. Q. 177. Did you find among the bank's papers any record of any drafts or exchange having been sent to the order of St. Benedict?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and not sufficient foundation laid and not the best evidence.

A. I did not.

(Witness excused.)

Mr. JOHN R. SCHMID, recalled:

Redirect examination.

By Mr. PITZER:

R. D. Q. 178. Mr. Schmid, handing you [*Ross*] Book marked "Defendant's Exhibit 1" which examine and state whether you can identify it?

A. Yes sir.

R. D. Q. 179. Is that the Pass Book of your bank kept by Father Wirth?

264 Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and not tending to prove any issue in the case.

A. I identify this as his Pass Book.

R. D. Q. 180. Have you now examined the entries contained in the Pass Book mentioned, and are now able to state whether those are the entries made at your bank on his account, both as to credits and charges?

A. All entries therein are made by the bank.

R. D. Q. 181. Is the Pass Book now in the same condition as it

was when the last entry, appearing either of debit or credit December 13, 1901, was made.

A. I believe it to be.

R. D. Q. 182. I hand you Exhibits 2, 3, and 4; are you able to identify the signatures on these instruments?

A. I am.

R. D. Q. 183. Whose signatures?

A. I judge them to be the signatures of Augustine Wirth.

R. D. Q. 184. And from those checks and stamps on them, can you say whether or not these checks were paid by your bank, and if so, charged to your account?

A. They were.

Mr. PITZER: Defendant offers in evidence especially Exhibits 1, 2, 3 and 4, and requests that the original exhibits be attached to the deposition for filing in the United States Court at Mankato.

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and not tending to prove any of the issues in the pleadings.

Exhibits 1, 2, 3 and 4 received and originals attached hereto and found at pages 55, 56, 57 and 58 of this transcript.

Cross-examination.

By Mr. KUEFFNER:

X Q. 185. You say you are familiar with the handwriting of Augustine Wirth?

A. Yes sir.

X Q. 186. Just look at Defendant's Exhibit "2"?

A. I judge it to be.

X Q. 187. Just look at Exhibit "3"?

A. I judge it to be.

X Q. 188. Now look at Exhibit "3"; is that his signature?

A. I judge it to be.

X Q. 189. Doesn't it appear to be entirely different?

A. Well, in a way.

X Q. 190. You did not see him sign it?

A. No sir.

X Q. 191. You did not see any of them signed?

A. No sir, but I am satisfied that it is the same signature.

X Q. 192. And you say of the different handwritings that those are his signatures?

265 A. I would pass on it in that way.

X Q. 193. You did not see him sign any of them?

A. No sir.

X Q. 193½. And you on your oath mean to say that you recognize that as Father Wirth's signature, meaning Exhibit "3"?

A. Well, as I said before, I would pass on it, would judge it to be his signature.

X Q. 194. Judge it to be because you see Judge Ross' signature?

A. No sir, because there is a great similarity in the signatures.

Redirect examination.

By Mr. PITZER:

R. D. Q. 195. And you know in whose handwriting Exhibit "3" is, the body of the check?

A. I do.

R. D. Q. 196. In whose writing?

A. That is my own.

R. D. Q. 197. Your own?

A. Yes sir.

R. D. Q. 198. Was that made out at the time it was signed?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial.

A. Why, it was made out before it was signed.

Witness excused.

Mr. ALBERT STEINHAUSER, called and affirmed.

Direct examination.

By Mr. PITZER:

D. Q. 199. Are you the Albert Steinhauser who is the defendant in each of the actions in which this testimony is being taken?

A. Yes.

D. Q. 200. You live at New Ulm, Brown County, Minnesota?

A. Yes sir.

D. Q. 201. And you are now the administrator of the estate of Augustine Wirth, deceased?

A. I am.

D. Q. 202. Will you state what the total amount of money is that you have received on account of the estate at this time?

A. $1,758.3-.

D. Q. 203. What is the total amount which you have disbursed for the estate account in all?

A. I have disbursed in all without to-day's expenses $635.14; this does not include my personal expenses or any of my fees.

D. Q. 204. Since your appointment as administrator by the Probate Court of Brown County, Minnesota, has any action been commenced against you for the recovery of any of the property in your hands as administrator other than the two actions in
266 which this testimony is now being taken in the above entitled [—].

A. No sir.

D. Q. 205. Mr. Steinhauser, other than the moneys which you have stated as having received and the sheriff's certificate of certain property issued in foreclosure which are scheduled by Exhibit "F 3" attached to the complaint in the action pending in the United States Circuit Court of Mankato in which the Order of St. Benedict is complainant have you received into your possession any other property of any description belonging to the estate?

A. I have not.

D. Q. 206. The sheriff's certificate, Mr. Steinhauser, which are mentioned in Exhibit "F3" referred to under the Minnesota Law, are those certificates evidence of title?

A. They are.

D. Q. 207. Is there a redemption.

A. There is, one year from the date of sale.

D. Q. 208. Then the time of redemption has expired?

A. It has.

D. Q. 209. And no redemption made.

A. No sir.

It is stipulated that Sections No-. 3727, 3728, 3730, 3733 and 4076 of the Revised Laws of Minnesota for the year 1905 which are as follows, are in force at this time as copy follows. The defendant offers in evidence the above mentioned sections which are as follows:

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial.

SEC. 3727. Order Limiting Time to Present Claim. Upon granting letter testamentary or of administration the Court shall make an order limiting the time for creditors to present claims against the estate, and fixing a time and place when and where proofs will be heard and such claims examined and adjusted. The time so limited shall not be more than one year, nor less than six months, unless it shall appear by affidavit that there are no debts, in which case the limitation may be three months; Provided, that when it shall appear from the petition for letters that the decedent left no property except his homestead and such personal estate as is allowed by law to the surviving spouse or minor children, no order in respect to claims need be made.

SEC. 3728. Order Published. Three weeks' published notice of such order shall be given, and the last publication shall be made within six weeks after the order is filed.

SEC. 3730. Claims, How Presented or Barred. All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the Court for allow-
267 ance, within the time fixed for the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement, need not be so presented or allowed. Claims presented for allowance shall be itemized, and be verified by an affidavit of the claimant or his agent or attorney showing the balance due, that no payments have been made thereon that are not credited, and that there are no offsets thereto known to the affiant. Any such claim may be [pleased] as an offset or counterclaim in any action brought against the claimant by the executor or administrator. If the claim presented [by] contingent, or not due, the particulars thereof shall be stated.

SEC. 3733. Actions Against Executors or Administrators. No action at law shall lie against an executor or administrator for the recovery of money upon any demand against the decedent allow-

able by the Probate Court, and no claim against a decedent shall be a charge upon his estate unless presented to the Probate Court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received.

SEC. 4076. Various cases, six years. The following actions shall be commenced within 6 years:

1. Upon a contract or other obligation, express or implied as to which no other limitation is expressly prescribed.

2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture.

3. For a trespass upon real estate.

4. For taking, detaining, or injuring personal property, including actions for the specific recovery thereof.

5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. For relief, on the ground of fraud, in which case the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

7. To enforce a trust or compel a trustee to account, where he has neglected to discharge the trust, or claims to have fully performed it, or has repudiated the trust relation.

268 8. Against sureties upon the official bond of any officer whether of the state or of any county, town, school-district, or municipality therein; in which case the limitation shall not begin to run until the term of such officer for which the bond was given shall have expired.

It is stipulated that the testimony of W. G. Hoerr be taken May 20, 1909, before Helen H. Schaefer, a Notary Public, instead of at the time and place stated in the original stipulation.

Mr. WM. G. HOERR, sworn:

Direct examination.

By Mr. PITZER:

D. Q. 210. Your name is?
A. William G. Hoerr.
D. Q. 211. You live at Mankato?
A. I do.
D. Q. 212. What is your age?
A. 48.
D. Q. 213. How long have you been a resident of Mankato?
A. All my life.
D. Q. 214. In his life time you were acquainted with Father Augustine Wirth?
A. I was.

D. Q. 215. For how long a time or since when?
A. I first knew him, I think, 1872; or about the time he came to Mankato.
D. Q. 216. What was his work at Mankato at that time?
A. He was pastor of the German Catholic Church at that time.
D. Q. 217. He was at Mankato from 1871 to '74?
A. I think so, several years.
D. Q. 218. He performed his pastoral duties there?
A. Yes sir.
D. Q. 219. And did he do any other work which might be construed church work or besides—I refer to the school, Mr. Hoerr, what did he do there in reference to the school?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, not tending to prove any issue in this case.

A. I do not think he had anything to do with the school which is there now, that was built afterwards,—was built by the Jesuits.
D. Q. 220. In 1872 you were still a boy?
A. Yes sir.
D. Q. 221. Were you acquainted with him after you engaged in business?
A. Yes sir.
D. Q. 222. What has been your business, Mr. Hoerr?
A. I engaged in the banking business.
D. Q. 223. Where?
A. At Mankato.
D. Q. 224. What bank?
—. It was the Citizens National, and after that new banking law, was organized as the "National Citizen" Bank, the same concern under the new charter.
269 D. Q. 225. How long were you connected with the bank in some official capacity?
A. Well, let's see—30 years.
D. Q. 226. Up to what time?
A. May 1, 1906.
D. Q. 227. Did you, either individually, or through your bank, have any business dealings with Father Wirth?
A. Yes sir.
D. Q. 228. How far back did that extend?
A. I think the first that I had to do with him was in 1887 or '8, along there.
D. Q. 229. What was the nature of your business transaction?
A. The first transaction I had with him, he had a mortgage on a section of land on Watonwan County, I think the land was 4 to 5 miles southeast of town, and he had not been able to get any interest from the party, could not get any response to his letters, and he wrote me about it and wanted me to go and see the party or write him and find out what I could do with him. I think that is the first time I had to do with him in any way of business transactions.
D. Q. 230. Were the papers in your hands for collection?

A. At that time? No.
D. Q. 231. Did you receive them?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and not the best evidence and no foundation laid.

D. Q. 232. To whom did the papers run?
A. Augustine Wirth.
D. Q. 234. Mr. Hoerr, was payment received on that land?

Mr. KUEFFNER: Same objection.

A. I did not receive payment from the mortgagor, but I bought the mortgage of him, and sent in a draft for the amount.
D. Q. 236. Where was Father Wirth at that time?
A. Newark, N. J.
D. Q. 237. You may state what further business transactions you had with him individually or for the bank?

Mr. KUEFFNER: Objected to as incompetent, immaterial.

A. Well, after that he had more or less business with the bank in the way of deposits on time certificates, and a little later Mr. Meyer, the President of the Bank at that time made some loans for him in his individual capacity; then after Mr. Meyer's death his correspondence was mostly with me, and I made a number of loans and investments for him from time to time, and after his removal to Springfield, and at his request collected and sent them in except a
$1,000 mortgage, which was still in my hands at the time of
270 his death, which I afterwards paid over to Mr. Steinhauser, the administrator of the estate, I think.
D. Q. 238. Did Father Wirth have any money on time certificates or deposits along in 1899?
A. No, I think not.
D. Q. 239. During the time he was in Springfield, did he carry any account with you? Any checking account?
A. That was all credit*ing* up to his checking account, but he never drew against his account for any personal use, unless it was to make a loan or something like that.
D. Q. 260. In whose name did the account stand?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

A. Stood in the name of Augustine Wirth.
D. Q. 261. And when you made a loan for him, in whose name were the securities drawn?
A. In the name of Augustine Wirth.
D. Q. 262. In whose name were the deposits?
A. All his business that he had with the bank or myself was in the name of Augustine Wirth.
D. Q. 263. In the case of a real estate mortgage, was that also taken in his name?
A. Yes sir.
D. Q. 264. The mortgage you collected and subsequently paid to

Mr. Steinhauser, did you not receive from Mr. Steinhauser, as administrator, a release of the mortgage for that money paid?

A. I think—I am not positive about that—come to think about it.

D. Q. 265. I hand you, Mr. Hoerr, for your examination, two letters which are marked "defendant's Exhibits 6 and [&] in possession of the defendant; after you have examined them you can state whether or not they are letters written by you?

A. Yes sir.

D. Q. 266. And the signature is your signature.

A. It is.

D. Q. 267. And they are written, are they, in relation to business matters you had then pending or on hand for Father Wirth?

A. Yes.

D. Q. 268. Do you recollect about the year 1897, a loan made by yourself to one Mr. Longini?

A. Yes, sir, I do.

D. Q. 269. And in respect to that loan, what, if any, collateral was given.

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial, and not tending to prove any issues in the case.

A. That was a $2,400.00 loan and was secured by 20 shares of stock of the National Citizens Bank of Mankato.

271 D. Q. 270. That loan was settled how?

Mr. KUEFFNER: Same objection.

A. The stock was sold to another party and was credited to Father Wirth's account.

D. Q. 271. Did you see Father Wirth during the time he was in Springfield?

A. I did.

D. Q. 272. Very often?

A. Every time he came to Mankato, and he was there a number of times.

D. Q. 273. Do you know of any work that he did besides his church work, either from your own knowledge or derived from your acquaintance and talk with him?

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial and the witness has shown no particular knowledge entitling him to judge.

A. He told me that he had a number of books that were published by some New York concern on which he was getting a royalty, and in fact he sent me a copy of about a half dozen of them, and I know he was getting money from that source. It came direct from him, he told me so.

D. Q. 274. Would you know the name of the Publishing House if you heard it.

A. It is not necessary to hear it.

D. Q. 275. What firm was it?

A. Benziger Bros.

D. Q. 276. You came from Mankato to New Ulm to give your testimony?

A. Yes sir.

D. Q. 277. What is the distance in miles?

A. I think about 26 miles.

The defendant offers in evidence separately Exhibits "6" and "7."

Mr. KUEFFNER: Objected to as incompetent, irrelevant and immaterial.

Mr. PITZER: Exhibit "6" received and is as follows:

MANKATO, MINN., *Nov.* 7, 1901.

Rev. Augustine Wirth, Springfield, Minn.

DEAR FATHER: Yours of recent date at hand. You have only the Roberts mortgage of $1,000——

The Mrs. Schnepf mortgage was paid last spring & I sent you check for the amount, $868.40 on April 12th——

The Roberts mortgage has not been paid—I expect the party down between this and Dec. 1st & will arrange to have him make a new loan and pay you.

272 Don't you think we had better hold out collect it for you?

I am sorry to learn that your health is such that you will have to give up your parish.

Yours truly,

W. G. HOERR.

Mr. PITZER: Exhibit "7" received and is as follows:

MANKATO, MINN., *Jan'y 6th,* 1899.

Rev. Augustine Wirth, Springfield, Minn.

DEAR FATHER: Wm. H. Macbeth came in to-day and executed the assignment of mortgage in your favor of the $1,350, for which you sent check. This draws interest from December 1st. The W. A. Roberts $1,000 mort. loan has also been completed.

Your package now contains the following mortgages:

Martha E. Gardner	$850.00
Wm. A. Roberts	1,000.

Dec. 1 received 3.31.

Henrietta Schnepf	1,100.

The int. on the Gardner & Deglemen notes will mature next month—I have notified them.

Respectfully,

W. G. HOERR.

Mr. PITZER: We ask also that the original exhibits be attached to the testimony for filing at Mankato.

Witness excused.

Mr. Wm. G. Hoerr re-called.

Cross-examination.

By Mr. Kueffner:

X Q. 279. Mr. Hoerr, you say you knew Father Wirth for a good many years?

A. Yes sir.

X Q. 280. Were you a member of his congregation?

A. Yes.

X Q. 281. Do you know whether he was a member of any religious order?

A. Yes sir.

X Q. 282. What was it?

A. He belonged to the Order of St. Benedict.

X Q. 283. Are you a member of the Catholic Church yourself?

A. Yes, sir.

X Q. 284. Were you educated at any of the schools of the Order of St. Benedict.

A. Well, I was sent to St. John's when I was about twelve years old.

273 X Q. 285. Do you know whether the Order of St. Benedict wear a habit different from other Orders or other priests?

A. Yes, I think almost every Order has a habit of their own?

X Q. 286. Do you know the habit of the Order of St. Benedict?

A. Yes, I think I do.

X Q. 287. Did Father Wirth wear the habit of the Order of St. Benedict, at the time of his death?

Mr. Petzer: Objected to as not proper cross-examination and incompetent.

A. Well, I did not know, I did not see him at the time of his death, but some little time before that—the last time I saw him at Mankato, he did.

X Q. 288. When did you see him last?

A. Well, it must have been about a year——

X Q. 289. The last time you saw him at Mankato was about a year before his death?

A. Yes sir, I think.

X Q. 290. Do you know whether Father Wirth ever corresponded with the Order of St. Benedict of New Jersey of your own knowledge?

A. I do not.

X Q. 291. Do you know of your own knowledge whether he ever remitted any money to the Order of St. Benedict of New Jersey?

A. No sir.

X Q. 292. Not of your own knowledge?

A. No sir.

X Q. 293. What was it that Father Wirth wore the last time you saw him which distinguished itself as a Benedictine habit?

A. Well, the Benedictines wear a habit different from the Jesuits or the secular priests, they all have habits peculiar to them—the

last time I saw him he had on his habit to come to Mankato from Springfield—he was stopping with the Jesuits at Mankato, and then in the [*fa*ter] noon he came over to my mother's house where I met him at home wearing the habit. I suppose it was the custom when he came down to the priests to wear his habit.

X Q. 294. Well, Mr. Hoerr, what was it?

A. Well, it was a blousy habit, with sort of a broad belt around his hips—I know it to be a St. Benedictine habit, different from the Jesuit Order.

X Q. 295. Do the secular priests wear habits?

A. Yes.

X Q. 296. What would the difference be from the habit of the Jesuits from that Father Wirth wore?

A. I know there is a marked difference. The secular priests wear a habit plain, I think, they have no belt at all. The
274 other orders have a habit more full, more like a robe. The secular priests have a habit more snug.

[X *X* 297.] How do the Jesuits' habits differ from that worn by Father Wirth?

A. Well, it differs some, but I can not say what respect just now, but I know it differs from the Benedictine habit.

PLAINTIFF'S EXHIBIT "1."

SPRINGFIELD, MINN., *Jan.* 2*d*, 1900.

Received from Geo. Ross Treasurer St. Raphaels Church Two Hundred Dollars.

Salary from July 1-99 to Oct. 1-1899.

$200.00.

AUGUSTINE WIRTH, *O. S. B.*

DEFENDANT'S EXHIBIT "1." H. H. S.

State Bank of Springfield, Springfield, Minn., in Account with Rev. Augustine Wirth.

Always bring your Book with Deposit.
See that the Entries agree with your Tickets.
Please leave your book once a month for balancing.

State Bank of Springfield.

Dr. In Account with Rev. Augustin Wirth. Cr.

			Checks.	
Apr. 2, 1900.	Balance	122.91	3/31	3.25
" 18,	Dep.	281.34	4/ 3	32.40
			18	36.
			18	50.
			25	4.
			25	3.
			25	10.
			30	4.05
			5/ 4	5.
			5/ 9 Bal.	256.55
		404.25		404.25

275

May 9, 1900.	Balance	256.55	5/12-1900	25.
" 16,	Dep.	62.	31	4.20
" 28,	"	263.	16	41.75
6-14-1900.	"	117.	6/14	5.50
7-19-1900.	"	389.30	15	36.
7-30-1900.	"	912.92	8 /1-1900	1,861.32
7- 3-1900.	"	33.		
		1,973.77		1,973.77

Aug. 1, 1900.				
	Balance	1,861.32	8/ 1-1900	1.
" 16,	Dep.	312.	1	181.
" 18,	"	67.50	3	50.
9-7.	"	300.	10	5.95
			10	7.60
			20	200.
			20	115.
			21	47.50
			21	30.
			22	.15
			24	100.
			9/ 7	38.53
				1,764.09
		2,540.82		2,540.82

Sep. 8, 1900.				
	Balance	1,764.09	9/15	106.
" 12,	Dep.	50.	19	16.66
" 18,	"	130.	18	14.15
			20	1.49
			22	32.50
			25	1,700.
				73.29
		1,944.09		1,944.09

Oct. 1, 1900.	Balance	73.29	10/13		2.67
15,	Dep.	185.75	18		.10
23,	"	100.	29		36.
11/3,	"	77.	19		2.
			18		10.
					385.27
		436.04			436.04

Nov. 5, 1900.	Balance	385.27	11/10		10.
" 5,	Dep.	1,854.	11/10		2,000.
" 7,	"	62.	11/14		2.
12-3-1900.	"	455.35			744.62
		2,756.62			2,756.62

276

Dec. 4, 1900.	Balance	744.62	12/22		40.
" 5,	Dep.	336.	28		21.13
" 5,	"	316.	29		2.00
" 10,	"	55.	29		2.50
" 22,	"	10.	1/ 7		223.52
1-7-1901.	"	100.			1,272.47
		1,561.62			1,561.62

Jan. 8, 1901.	Balance	1,272.47	1/ 8-1901		9.87
23,	Dep.	300.	15		2.
29,	"	149.45	17		7.
			21		700.
			23		1.66
			26		2.
			28		6.30
					993.09
		1,721.92			1,721.92

Feb. 1, 1901.	Balance	993.09	3/ 8		4.25
Mar. 4, '01.	Dep.	37.	8		14.45
" 14, "	"	100.00	19		5.
			21		5.
			28		7.03
					1,094.36
		1,130.09			1,130.09

Apr. 1, 1901.					
	Balance	1,094.36	4/ 2		2.25
" 13,	Dep.	60.	4		1.25
" 16,	"	868.40	4		10.00
			20		6.65
			22		4.
			6/ 7		100.
					1,898.61
		2,122.76			2,022.76
Jun. 8, 1901.			6/19		8.55
	Balance	1,898.61	26		500.
7-16-'01.	Dep.	175.	7/ 3		2.50
29,	"	50.00	25		5.
			8/ 2		.10
			8/ 3		61.31
			16		10.
			19		.10
					1,536.25
		2,123.61			2,123.61
277					
Sept. 3, 1901.			9/ 5		11.
	Balance	1,536.25	21		20.
" 30, '01.	Dep.	210.	27		5.95
					1,709.30
		1,746.25			1,746.25
Oct. 1, 1901.			10/ 2		1,500.
	Balance	1,709.30	18		180.20
" 5,	Dep.	237.90	21		2.
" 10,	"	100.			495.
" 22,	"	130.			
		2,177.20			2,177.20
Nov. 1, 1901.			11. 7-01		2.
	Balance	495.	11.22-01		5.90
4,	Dep.	100.	12.13-01		1,000.00
4.	"	305.			2.10
12-13-01.	" by Geo. Ross.	110.			
		1,010.			1,010.
Apr. 1, 1902.					
	Balance	2.10	4/ 3-02		2.10

DEFENDANT'S EXHIBIT "2."

No. —.

SPRINGFIELD, MINN., *Oct.* 18*th*, 1901.

State Bank of Springfield.

Pay to Mr. C. Weiss or Order $2.00 Two Dollars.

AUGUSTINE WIRTH.

(Endorsed:) C. Weiss. Weiss Bros. Pay to the Milwaukee National Bank, or Order Dahlman & Inbusch Co. Pay First National Bank, Minneapolis, Minn. or Order Milwaukee Nat'l Bank, of Wisconsin, Wm. F. Filter, Cashier. Defendant's Exhibit "2".
278 Pay any Bank or Banker, or Order First National Bank, Minneapolis, Minn. C. T. Jaffray, Cashier.

DEFENDANT'S EX. 3.

No. —.

SPRINGFIELD, MINN., *Dec.* 11, 1901.

State Bank of Springfield.

Pay to Rosina Schneider *on* Order $1,000.00 One Thousand Dollars.

AUGUSTINE WIRTH, *Pastor.*

Witnessed by
GEO. ROSS.

ROSINA SCHNEIDER.

(Across face is the following:)
State Bank of Springfield. Paid Dec. 13 1901, Springfield, Minnesota.

(Endorsed:) Defendant's Ex. 3.
1010 1007.90
1007.90

2.10

DEFENDANT'S EX. "4".

3435

No. —.

SPRINGFIELD, MINN., *Nov.* 18*th*, 1901.

State Bank of Springfield.

Pay to the Despres Co. or Order $5.90 Five 90/100 Dollars.

AUGUSTINE WIRTH.

(Across face is the following:)
State Bank of Springfield. Paid Nov. 22, 1901. Springfield, Minnesota.

(Endorsed:) The Despres Co. Pay Corn Exchange Bank, or Order. Despres & Co. Pay any Bank or Banker, or Order First National Bank, Minneapolis, Minn. C. T. Jaffray, Cash.
279 Defendant's Exhibit "4". Pay First National Bank, Minneapolis, Minn. or order The Corn Exchange Nat'l Bank of Chicago, Ill. Frank W. Smith, Cashier.

DEFENDANT'S EXHIBIT "5".

APRIL 3, 1902.

Rev. Augustine Wirth to St. Paul Draft.
Peter Engel Sec'y St. John's ministry Collegeville for Augustine Werth, $2.10.
Paid Apr. 3, 1902. State Bank of Springfield, Minn.

DEFENDANT'S EXHIBIT "6".

W. G. Hoerr, President. H. E. Swan, Cashier.
Lorin Cray, Vice President. W. C. Henlein, Ass't Cashier.

Capital $100,000, Surplus Profits $45,000.

National Citizens Bank.

MANKATO, MINN., *Nov. 7th,* 1901.

Rev. Augustin Wirth, Springfield, Minn.

DEAR FATHER: Yours of recent date at hand. You have only the Roberts mortgage of $1,000,
The Mrs. Schuepf mortgage was paid last spring and I sent you check for the amount, $868.40 on April 12th—
The Roberts mortgage has not been paid. I expect the party down between this & Dec. 1st & will arrange to have him make a new loan and pay you.
Don't you think we had better hold and collect if for you?
I am sorry to learn that your health is such that you will have to give up your parish.
Yours truly,

W. G. HOERR.

(Endorsed:) (Defendant's Exhibit "6" H. H. S.)

280 DEFENDANT'S EXHIBIT "7".

W. G. Hoerr, Pres. John B. Meagher, Cashier.
Lorin Cray, Vice Pres. W. C. Henlein, Ass't Cashier.

Capital $100,000, Surplus and Profits $35,000.

National Citizens Bank.

MANKATO, MINN., *Jan'y 6th*, 1899.

Rev. Augustine Wirth, Springfield, Minn.

DEAR FATHER: Wm. H. Macbeth came in to-day & executed the assignment of mortgage in your favor of the $1,350 for which you sent check. This draws interest from Dec. 1st.

The W. H. Roberts $1,000 mortgage has also been completed.

Your package now contains the following mortgages:—

Martha E. Gardner	$850
Wm. A. Roberts	1,000
Dec. 1, received 3.31	1,100
Henrietta Schnepf	....
	3,000

The int. on the Gardner & Degleman notes will mature next month. I have notified them.

Respectfully,

W. G. HOERR.

(Endorsed:) Defendant's Exhibit "7" H. H. S.

United States Circuit Court within and for the Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustine Wirth, Deceased, Defendant.

STATE OF MINNESOTA,
County of Brown, ss:

I, Helen H. Schaefer, Notary Public in and for said County and State, do hereby certify that in the taking of the depositions of the witnesses, Geo. Ross, John R. Schmid, Albert Steinhauser and W. G. Hoerr, the said witnesses were each by me duly sworn to testify the truth, the whole truth and nothing but the truth, pertaining to the matters inquired into in relation to the above entitled actions.

281 That the testimony given by the said witnesses was correctly taken down by me at that time in shorthand and after-

wards transcribed by me in typewriting, and that the foregoing is a correct transcript of the evidence so given by them and all the evidence then offered by either party to said actions, correct copies of said Exhibits so offered are attached and found in the preceding pages 54, 55, 56, 57 and 58.

That said depositions were taken at the time and place in the annexed stipulation specified. That I am neither counsel, attorney or relative of either party, or in any way interested in either of said actions nor in the result thereof.

Dated June 25, 1909.

HELEN H. SCHAEFFER,
Notary Public, Brown County, Minn.

My commission expires Nov. 24, 1—.

NEW ULM, MINN., *July* 8, 1909.

Albert Steinhauser, Administrator of the Estate of Augustine Wirth, Deceased, to Helen H. Schaefer, Notary Public, Dr.

To fees, taking deposition- of Geo. Ross, John R. Schmid, Wm. G. Hoerr, and Albert Steinhauser, for use in evidence in the case of Louis G. Benziger and Another, Plaintiffs, vs. Albert Steinhauser, administrator, etc., defendant, in the Circuit Court of the United States for the District of New York, Southern Division:

Writing and certifying testimony, at 15c. a folio, 154 folios	$23.10
Administering four oaths at 15c. each	.60
Noting 41 objections at 15c. each	6.15
Total	29.85

Received payment,

HELEN H. SCHAEFER.

NEW ULM, MINN., *July* 7, 1909.

Albert Steinhauser, Administrator of the Estate of Augustine Wirth, Deceased, to Helen H. Schaefer, Notary Public, Dr.

To fees, taking deposition- of Geo. Ross, John R. Schmid, Wm. G. Hoerr, and Albert Steinhauser, for use in evidence in the case of The Order of St. Benedict of New Jersey, Plaintiff, vs. Albert
282 Steinhauser, as Administrator, etc., Defendant, in the Circuit Court of the United States within and for the District of Minnesota, Second Division:

Taking and transcribing testimony, at 15c. a folio, 154 folios	$23.10
Administering four oaths at 15c. each	.60
Noting 41 objections at 15c. each	6.15
	29.85

Mileage fee:

Geo. Ross	1.12
John R. Schmid	4.60
W. G. Hoerr	4.12

Received payment,

HELEN H. SCHAEFER.

Endorsed: Deposition. Filed July 13, 1909. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Defendant.

STATE OF NEW JERSEY,
County of Passaic, ss:

Depositions of sundry witnesses, taken before me, William W. Watson, a Notary Public, within and for the County of Passaic, in the State of New Jersey, pursuant to oral stipulation of the Attorneys for the respective parties, personally appearing before me as hereinafter recited, which said depositions were taken at my office in the City of Passaic, in the said County and State, on the first day of May, 1909, at 11:30 in the forenoon of said day, to be read in evidence upon the trial of that certain action now pending undetermined in the Circuit Court of the United States, within and for the Southern District of New York, wherein said Louis G. Benziger and Nicholas C. Benziger are Complainants and Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, is defendant.

Appearances:

Frank W. Arnold, Esq., Solicitor for Complainants, by Frederick C. Gladden, Esq., of Counsel.

283 Charles L. Burr, Esq., Solicitor for Defendant, by Ambrose E. Hayes, of Counsel.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Defendant.

ROSE SCHNEIDER, called and sworn as a witness for defendant, testified as follows:

Direct examination.

By Mr. HAYES:

Q. Miss Schneider what is your full name?
A. Rose Schneider.
Q. Where do you live?
A. I live on the corner of Monroe and 10th Streets, Passaic, New Jersey—St. Joseph's Rectory.
Q. You are employed there?
A. Yes.
Q. By whom?
A. Rev. Valentine Chebousky.
Q. How long have you been employed there?
A. At Rev. Father Chebousky's?
Q. Yes?
A. 8 years in March.
Q. Was it 8 years last March?
A. The 11th of March, 1902, I came there—that is 8 years isn't it?
Q. That will be eight years next March—is that correct?
A. Yes.
Q. Were you previously employed before you came there?
A. Yes.
Q. You were employed by Rev. Father Augustin Wirth?
A. Yes.
Q. How long did you know Father Wirth before he died?
A. I know him since August the 14th, 1895.
Q. 1895?
A. 1895, I think that is the first time I saw him.
Q. You were employed by him — that time on?
A. I got there on the 28th of August.
Q. That is when you entered his employ?
A. I got there to work for him on the 28th of August, 1895.
Q. Where was that?
A. Elizabeth, New Jersey,—Sacred Heart Church.
Q. As housekeeper?
A. Yes.
284 Q. Did you continue with Father Wirth until the time of his death?
A. Yes.
Q. You were employed by him at that time?
A. Yes.

Q. Where did he die?
A. Springfield, Minnesota.
Q. When.
A. On or about the 20th of December, 1901.
Q. How long after Father Wirth's death did you live there?
A. Just four weeks after his death.
Q. When was that?
A. On the 20th day of January, 1902, I left the house.
Q. You said you were employed there as house-keeper, did you not?
A. Yes.
Q. What disposition was made of Father Wirth's personal property after he died?
A. It was all packed up and sent to the Monastery.
Q. What Monastery?
A. St. Mary's Abbey—Newark, New Jersey.
Q. That was books that he had?
A. Yes, that is all—he did not have much belongings around the house.
Q. And they were sent to St. Mary's Abbey, Newark, New Jersey?
A. Yes.
Q. Is that the Abbey of the Order of St. Benedict?
A. Yes.
Q. Was Father Wirth, to your knowledge, at work on a new book at the time of his death?
A. He was translating some manuscripts from the English into the German.
Q. That work had not been completed?
A. No, I don't think it has been completed.
Q. What became of the manuscript?
A. That was taken away by the Administrator that was sent by the Abbot from Collegeville, Minnesota.
Q. Do you know Florian Wirth?
A. Yes.
Q. Do you know Elizabeth Wirth, wife of Florian Wirth?
A. Yes.
Q. Who is Florian Wirth?
A. He is a nephew of Rev. Father Augustin Wirth.
Q. Who is Elizabeth Wirth?
A. His wife.
Q. When you were employed at the Church, in Elizabeth, New Jersey, did you see Father Wirth there?
A. Yes.
Q. Did you have opportunities to observe his daily routine—manner of living, &c., at the Rectory?
A. Yes.
Q. You know that Father Wirth had written and published many books?
A. Yes.
285 Q. Do you know, of your own knowledge, at what time of the day Father Wirth did most of the work on these books?

A. Generally in the morning—he used to get up early.
Q. Was that before his church duties commenced?
A. Yes.
Q. Did he do considerable of this writing after his church duties were over?
A. No he didn't.
Q. Did Father Wirth receive many orders for these books through the mail to your knowledge?
A. When we were in Elizabeth, but not after.
Q. While you were at Elizabeth in his employ did he receive many orders for these books?
A. Yes.
Q. Who filled the orders?
A. Father Wirth, himself.
Q. Did anybody assist him there at that work?
A. Mr. Keogh assisted him there.
Q. Did Florian Wirth assist him in this work, to your knowledge?
A. I think he was there once in a while.
Q. Do you know Father Boniface Weimer?
A. No.
Q. Did you ever hear Father Wirth speak of Father Boniface Weimer?
A. No, I did not exactly hear him speak of him—I only knew that he was the Abbot at the time he started his work.
Q. When who started his work?
A. Father Augustin Wirth.
Q. Is Father Boniface Weimer dead?
A. Yes, he is dead.
Q. Been dead some time?
A. Yes.
Q. Did Father Wirth ever say to you that Father Boniface Weimer, the Abbot of the Order of St. Benedict, had given him permission to write these books, publish them and keep the proceeds?
A. Yes.
Q. Did Father Wirth tell you this?
A. Yes, I heard this.
Q. I wish you would state just what Father Wirth told you in this connection—tell it in your own way, won't you?
A. Why, he said whatever he earns with his pen [*in*] his own that he got the permission from the Abbot.
Q. Father Wirth told you this?
A. Yes.

Mr. GLADDEN: I move to strike out this evidence on the ground that it is clearly irrelevant, incompetent and immaterial, and concerning the declaration of a deceased person—there being no other person present.

Q. Did Father Wirth say to you that Abbot Boniface Weimer told him that by reason of his publishing these books he must not use

any of the church's money and that he must not obligate the church in any way. You understand that question?

A. Yes, that is right.

Q. Father Wirth told you that?

A. Yes, sir.

286 Mr. GLADDEN: Same objection and the motion to strike out.

Q. To your knowledge, did Father Wirth have a bank account in Elizabeth in his own name?

A. I don't know that—I could not say.

Q. Did he have any in Springfield, Minnesota?

A. Yes.

Q. In wh-t bank?

A. State bank.

Q. Did Father Wirth, to your knoweldge, lend out money on bond and mortgage?

A. Yes, I know he did lend out money.

Q. On more than one occasion?

A. I think so.

Q. Can you give us the names of persons to whom he loaned money on bond and mortgage, or notes?

A. I could not give you the names—I don't know.

Q. You don't know the names of these people?

A. Mr. Ross could give you the information about that.

Q. You don't know the names?

A. Yes some of them.

Q. Give me their names?

A. There is a party in Elizabeth.

Q. What is his name?

A. Alfred —— Mrs. Wirth knows him, you can get the information from her—I cannot remember his name just now.

Q. How about Springfield, Minnesota, did he lend money out there on notes or bond and mortgage?

A. I could not say.

Q. Do you know whether or not he loaned money to the Order of St. Raphael?

A. Yes, that is the church.

Q. How much?

A. I think it was $3,500.

Q. Did he loan that money?

A. He loaned that money to the church but it was paid afterwards to Mrs. Elizabeth Quinn.

It is Hereby Stipulated and Agreed, that the testimony of Rose Schneider, may be taken in this case before William W. Watson, Esq., a Notary Public; that the minutes of the same may be taken down in shorthand by A. M. Kavanaugh, notwithstanding the fact that she is employed in the office of the Solicitor for the defendant, and in view of the fact that the witness departs for Europe the day

after the taking of this testimony, her signature thereto is hereby waived.

ARNOLD & GREENE,
Solicitor for Complainants.
CHAS. L. BURR,
Solicitor for Defendant.

287 STATE OF NEW JERSEY,
County of Passaic, ss:

I, William W. Watson, a Notary Public, duly qualified for and residing in the County of Passaic, do hereby certify that Rose Schneider was by me first duly sworn, to testify the truth, the whole truth, and nothing but the truth, and the deposition by her given as above set forth, was reduced to writing by A. M. Kavanaugh, who is not interested in the suit, and who is not Attorney for or related to any party to said suit, in my presence, and in the presence of the witness, and was taken at the time and place first herein specified.

And I further hereby certify that I am not Attorney for or related to any party to said suit, or in any way interested in said suit.

WILLIAM W. WATSON,
Notary Public, Passaic County.

Endorsed: Deposition of Rose Schneider. Taken at Passaic, New Jersey, May 1st, 1909. Filed May 12, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIEGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

STATE, COUNTY, AND SOUTHERN DISTRICT OF NEW YORK, *ss:*

Depositions of sundry witnesses, taken before me, C. C. Shumway, a Notary Public, within and for the county of New York, in the City of New York, pursuant to oral stipulation of the Attorneys for the respective parties, personally appearing before me, as hereinafter recited, which said depositions were taken, by consent, at the office of Charles L. Burr, Solicitor for the defendant, in the said County and State of New York, on the 24th day of May, 1909, at 3:30 o'clock in the afternoon of said day, to be read in evidence upon the trial of that certain action, now pending undetermined in the Circuit Court of the United States, within and for the Southern District of New York, wherein said Louis G. Benziger and Nicholas C. Benziger are Complainants, and Albert Steinhauser, as Administrator of the goods, chattels and credits of Augustin Wirth, is Defendant.

288 Appearances:

Frank W. Arnold, Esq., Solicitor for Complainants, by Frederick C. Gladden, of Counsel.

Charles L. Burr, Esq., Solicitor for Defendant, Ambrose E. Hayes, of Counsel.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIEGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

THOMAS J. KEOGH, called and sworn as a witness for the defendant, testified as follows:

Direct examination.

By Mr. BURR:

Q. Where do you reside, Mr. Keogh?
A. I reside at 411 Madison Avenue, Elizabeth, New Jersey.
Q. Did you know Augustin Wirth in his life time?
A. I did, yes sir.
Q. When did you first make his acquaintance?
A. In 1887.
Q. What position did he occupy at that time?
A. Well he was in the Abbey, he wasn't doing anything at that time.
Q. In St. Mary's Abbey, Newark, New Jersey?
A. Yes sir.
Q. Prior to that time where had he been?
A. In the Church of the Sacred Heart in Elizabeth.
Q. Are you a member of that Church?
A. I am and have been ever since, up to this time.
Q. Did you call upon Augustin Wirth at the Abbey?
A. I did, several times.
Q. At his request?
A. At his request.
Q. Did you have a conversation with him at that time?
A. I did, yes sir.
Q. About his going away from the Abbey and his reasons for it?
A. Yes, I did.
Q. Now state that conversation.

Mr. GLADDEN: Objected to on the ground of being absolutely immaterial, irrelevant, incompetent, and not material to the issues, besides being and concerning a conversation with a deceased person, not in the presence of a third person.

A. Well, I don't know as it would help either one of you any. It was only that he asked me over there and told me
289 that he would like me to do for him, that was so he could get out of the Abbey; that he was tired and sick of it and was

very sorry that he had left the Church where he belonged, that is the Sacred Heart Church. He asked if I couldn't go and see the Bishop. Mr. —— and Mr. Smith were with me at the time, and we went over there; we went over there three or four times and tried to get him back. We went and spoke to the Abbot; Mr. McLaughlin, Mr. Lovett, myself, and some one else, I can't say exactly who it is, I don't think of them now. We went over to see the Abbot but he wouldn't listen to us.

Q. Who was present when you had this first conversation with Augustin Wirth?

A. No one, we were in the room by ourselves.

Q. What did he say to you about his relations with the Order of St. Benedict?

Mr. GLADDEN: Objected to on the ground of being absolutely immaterial, irrelevant, incompetent, and not material to the issues, besides being and concerning a conversation had with a deceased person and not in the presence of a third person.

A. He didn't say anything.

Q. About whether his relations with Father Hilary were agreeable or not?

A. He said they were always [quar-elling], they could not agree. He did not state his reason.

Mr. GLADDEN: I object to the question and move to strike out the answer on the grounds already above mentioned.

Q. Shortly after that did Augustin Wirth return to Elizabeth as Pastor of your Church?

A. He went, after leaving the Order, he went to Wilmington. Then he wrote me the Abbot was going to send him back to our Church, and about a week or two before he came back he sent his housekeeper, that he had with him at our Church, and she stayed two weeks at our house until such time as he came down.

Q. [*What*] was Rose Schneider?

A. No, that was Mrs. Rogers. Miss Schneider came there after Mrs. Rogers.

Q. Then he returned to your church?

A. Yes, our church.

Q. How many years did he remain there?

A. Until 1897.

Q. When did he come there?

A. He came there in 1889, I think around November 15th.

290 Q. And during these years were your relations very intimate with him?

A. Yes sir, sat with me every night at the house.

Q. About 1889 was there some trouble of a money nature between Father Hilary and your Church?

A. Yes sir.

Q. And were accounts demanded by Father Hilary?

A. Yes sir.

Q. Who prepared those accounts?

A. Well the Sister made them up first.

Q. What part did you take in it?

A. I made them up afterwards. They did not satisfy Father Hilary, said they were not correct, and I went over them and found several mistakes in them which should not have been there.

Q. Did you go to St. Mary's Abbey and have a conference with Father Hilary about them?

A. I did.

Q. And did he come over to the Parish House and have a conference with you and your son and Augustin Wirth about them?

A. Yes sir.

Q. And did he come a second time?

A. He did.

Q. Did the Bishop come?

A. Yes.

Q. Those accounts were finally satisfactorily adjusted?

A. No sir, they couldn't come to any agreement.

Q. How long was this matter of accounting pending?

A. Well, it was pending from April 1887 to November first or fifteenth, I think the fifteenth, 1889.

Q. Was there constant discussion back and forth?

A. Fighting all the time about it.

Q. [Dissession.]

A. Yes sir.

Q. Those accounts concerned what moneys?

A. It was Church money.

Q. Only Church money?

A. Only Church affairs.

Q. Did you know during all this time that Augustin Wirth was engaged in publishing and selling books?

A. Yes, very well.

Q. Did this dissension have anything to do with his own moneys derived from the sale of these books?

A. No sir.

Mr. GLADDEN: Objected to unless Mr. Keogh knows of his own knowledge. Do you Mr. Keogh?

A. I do.

Objection withdrawn.

Q. During all this time, these several years, did you have frequent interviews with Father Hilary about it?

A. I had two or three.

Q. Did you have some correspondence?

291 A. No, I did not correspond with him, I went to his place and he came down there.

Q. At any of these interviews which you had with Father Hilary, was anything said about the moneys which Augustin Wirth derived from the sale of his books?

A. No sir, he never made any remarks to me.

Q. He made no remarks?

A. No sir, about any money, not even the Church money.
Q. Father Hilary?
A. No sir.
Q. I thought you told me he claimed $2,600?
A. That is the $2,300 Father Wirth told me he claimed, not Father Hilary.
Q. From whom did he claim it.
A. The Church.
Q. Father Hilary was not satisfied with the accounts as you had prepared them?
A. No sir, he said they were not right.
Q. Did he state how much they were out of the way?
A. Well, he didn't say exactly to me. He did not tell me, did not state any amount, but Father Wirth told me that he came down to fourteen hundred and some odd dollars.
Q. And they were finally disposed of by the payment of what sum?
A. Well, I don't know. We took it up with the Bishop; the Trustees and myself.
Q. During this conversation no claim was made to any of Wirth's money?
A. No, not one cent. He wasn't brought in at all.
Q. Did you assist Augustin Wirth in his work as a publisher and writer?
A. All I done was to write circulars for him.
Q. Writing circulars?
A. Yes, writing the different priests all over the United States.
[A.] Do you know as a fact that he circularized the Priests of the United States generally?
A. Yes, he had all the names of the Priests there.
Q. Sent circulars to them?
A. Sent circulars to them. Gave me a book that he had with all the Priests' names, and told me who I was to write to and I would fill them out.
Q. Would you stamp, address and mail these envelopes?
A. I addressed them, yes sir.
Q. Did you prepare his books for shipping?
A. I did, many a time.
Q. Did you ship them?
A. Well, I left them all packed, ready for the express to take them from the door.
Q. When did Father Wirth resign?
292 A. The last time in '97, August.
Q. What was his state of health when he resigned.
A. He was a pretty sick man at that time, I couldn't say exactly what was the matter.
Q. What did you do for him after he resigned; where did you take him?
A. I took him to the Hospital. He came to my house and was not able to go to the Hospital, so stayed in my house for the night, and as I couldn't go there the next morning, on account of making

up statements, I told him I would go in the afternoon, so we both went in the afternoon.

Q. Mrs. Florian Wirth went with you?

A. Mrs. Florian Wirth. We took him to St. Michael's, Newark.

Q. How long did he remain there?

A. That was Monday—I think Sunday he went down to Latrobe, Westmoreland County, Pennsylvania.

Q. Do you know how long he remained there?

A. That I couldn't say.

Q. About how long.

A. Well, I couldn't say.

Q. When did you next see him?

A. I next saw him in the Astor house.

Q. Here in New York?

A. Yes.

Q. How long was that after he had gone to Latrobe?

A. Well, it may be two or three months, or it might be only six weeks, but I couldn't say.

Q. Do you know how long he remained at the Astor house?

A. He remained there, I think, two weeks, I wouldn't say positively.

Q. Then where did he go?

A. From there he went to Europe.

Q. Do you know when he returned?

A. He returned, I couldn't say whether it was three or four months.

Q. Did he come up to your house?

A. No ; he came back to the Glen Island Hotel.

Q. Do you know how long he stayed there?

A. I think a week.

Q. You saw him there?

A. I saw him there one Sunday afternoon.

Q. Then where did he go?

A. Then he went west—no, he came out to my house and stayed a week and then went West to Minnesota.

Q. During these times what did he say to you, if anything, about ever returning to St. Mary's Abbey?

293 Mr. GLADDEN: Objected to on the ground that it is absolutely immaterial, irrelevant, incompetent, and not material to the issues, besides being and concerning a conversation with a deceased person, not in the presence of a third person.

A. He said he would never go back while the Abbot was there.

Q. He never would return there?

A. No, never would return.

Q. Did he say why?

A. No.

Q. Did he ever tell you how much money he had given to the Abbey.

A. He did, yes.

Q. How much did he pay it?

A. He told me he gave $11,000. He told me in 1889 that is what he gave when he left in 1887.

Q. What did he say to you about the money that came from the sale of his book, to whom it belonged?

Mr. GLADDEN: Objected to on the ground that it is absolutely immaterial, irrelevant, incompetent, and not material to the issues, besides being and concerning a conversation had with a deceased person and not in the presence of a third person.

Q. What did he say to you about permission to publish his books?

A. Well, he didn't say anything to me about that. Had the Abbot down there to publish his books.

Q. Did Father Hilary attempt to assess your Church for the benefit of the Order $1,600 at one time?

Mr. GLADDEN: Objected to as absolutely incompetent, immaterial, irrelevant, and nothing to do with the issues in this case.

A. Well I think there were some remarks.

Q. For the College.

A. For the College. He wanted to get a collection taken up in our congregation and Father Wirth wouldn't have it.

Q. What did Father Wirth say?

A. He said there was enough expense on the congregation without putting more on.

Q. That collection was to be taken up for the benefit of the College of the Order of St. Benedict at Newark?

A. No, Manchester.

Q. Manchester?

A. Yes.

Q. Did Father Augustin announce this from the pulpit?

A. I don't think he did.

294 Q. Didn't he announce from the pulpit on some occasion that the Order had had all the money they were entitled to from your Church?

A. I don't know.

No cross-examination.

EDWARD J. KEOGH, called and sworn as a witness for the defendant testified as follows:

Inasmuch as the facts testified to by the witness, Thomas J. Keogh, are within the personal knowledge of this witness, it is hereby stipulated and agreed; that Mr. Edward J. Keogh, will give the same testimony that his Father has just given, upon the same questions, and that the testimony of the witness Thomas J. Keogh shall be considered also as the testimony of the witness Edward J. Keogh, as to those questions.

Direct examination.

By Mr. BURR:

Q. In 1889 and thereafter, did you assist Augustin Wirth in work done on his books?

A. I did.

Q. How old were you at that time.

A. Well, at that time I was seventeen.

Q. And what would you do?

A. I directed envelopes for him, and packed his books; wrapped his books up and carted them to the Post-Office in small quantities, and the large quantities the Express would call for same.

Q. How large a quantity did you ever assist in mailing?

A. Well mailing—I mailed maybe four or five books at a time.

Q. In all the circularization?

A. Well, I carted clothes—baskets full over for him.

Q. Did you also make deposits in his Bank account for him?

A. Yes sir.

Q. At wnat bank?

A. National State.

Q. In what city?

A. Elizabeth.

Q. Do you know the title of that bank account? In whose name it was carried?

A. Father Wirth.

Q. Augustin Wirth, was it.

A. Augustin Wirth.

Q. What did Father Wirth say to you about the income from his books?

Mr. GLADDEN: Objected to on the ground that it is absolutely immaterial, irrelevant, incompetent, and not material to the issues, besides being and concerning a conversation with a deceased person not in the presence of a third person.

A. He claimed he received a royalty for his books, that was all I ever heard.

295 Q. How about permission from somebody to publish them?

A. He said he had permission from the Abbot in Latrobe, St. Vincent's, Westmoreland County, Pennsylvania.

Q. Do you know that Father Wirth loaned money?

A. That I could not say, only from what I heard.

Q. Do you know Joseph Wirth?

A. I do.

Q. In what degree is he related to the last Father Wirth?

A. A nephew's son—a grand nephew.

Q. Was that young man studying to be a Priest?

A. Not at that time.

Q. Did you ever hear Augustin Wirth express himself concerning this nephew's joining the Order of St. Benedict?

A. Well, he said they wanted to make a priest out of the other boy, but he did not want him to join the St. Benedictine Order.

Q. What did he say?

A. He didn't want him to join the Benedictine Order.

No cross-examination.

It is Hereby Stipulated and Agreed, that the testimony of Thomas J. Keogh and Edward J. Keogh, may be taken in this case before C. G. Shumway, a Notary Public; that the minutes of the same may be taken down in shorthand by K. L. Robinson, notwithstanding the fact that she is employed in the office of the Solicitor for the defendant.

____ ____,
Solicitor for Complainants.

____ ____,
Solicitor for Defendant.

STATE, COUNTY AND SOUTHERN
DISTRICT OF NEW YORK, *ss:*

I, C. G. Shumway, a Notary Public, duly qualified for and residing in the County of New York, do hereby certify that Thomas J. Keogh and Edward J. Keogh were by me first duly sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by them subscribed, as above set forth, were reduced to writing by K. L. Robinson, who is not interested in the suit and who is not Attorney for or related to any party to said suit, in my presence, and in the presence of the witnesses, and was taken at the time and place therein specified.

I further hereby certify that I am not Attorney for or related to any party to said suit, or in any way interested in said
296 suit; that the signing of said testimony was by the attorneys for the parties hereto waived.

[NOTARIAL SEAL.] C. G. SHUMWAY,
Notary Public, New York County.

Endorsed: Depositions of Thomas J. Keogh, and Edward Keogh. Taken at New York City May 24th, 1909. Filed May 12, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of AUGUSTIN WIRTH, Deceased, Defendant.

STATE OF NEW JERSEY,
County of Union, ss:

Depositions of Sundry Witnesses Taken Before Me, William H. Ryan, a Notary Public Within and for the County of Union, in the State of New Jersey, Pursuant to Oral Stipulation of the Attorneys for the Respective Parties Personally Appearing Before Me as Hereinafter Recited, which Said Depositions Were Taken in the City of Elizabeth, in the Said County and State, on the Twenty-first Day of May, 1909, to be Read in Evidence Upon the Trial of that Certain Action Now Pending Undetermined in the Circuit Court of the United States Within and for the Southern District of New York, Wherein Said Louis G. Benziger and Nicholas C. Benziger are Complainants and Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, is Defendant.

Appearances:

Frank W. Arnold, Esq., Solicitor for Complainants, by Frederick C. Gladden, Esq., of Counsel.
Charles L. Burr, Esq., Solicitor for Defendant, by Ambrose E. Hayes, of Counsel.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of AUGUSTIN WIRTH, Deceased, Defendant.

297 ELIZABETH J. WIRTH, of 915 Magnolia Avenue, Elizabeth, N. J., called and sworn as a witness for defendant, testified as follows:

Direct examination.

By Mr. HAYES:

Q. Mrs. Wirth, what is your full name?
A. Elizabeth J. Wirth.
Q. Did you know Augustin Wirth, deceased?
A. Yes.
Q How long have you known him.
A. Personally I have known him six years.

Q. You have known his six years?
A. Yes, personally.
Q. Do you mean six years before his death?
A. Six years before his death.
Q. When did he die?
A. He died December 20th, 1901.
Q. Where?
A. Springfield, Minn.
Q. Do you know whether or not Father Wirth published any books during his lifetime?
A Yes.
Q. About what year, to your knowledge, did he begin to publish books?
A. For the last twenty-eight years, to my knowledge.
Q. How did he find a market for these books?
A. Through advertising to all parts of the world.
Q. Did he send out circulars—is that what you mean?
A. Yes.
Q. Did you at any time assist him in this work?
A. Yes.
Q. Are you in any way related to Father Wirth?
A. A niece by marriage.
Q Is your husband still alive?
A. Yes.
Q. What is his name?
A. Florian A. Wirth.
Q. Did he, to your knowledge, assist in this work also?
A. Yes.
Q. For how long a period of time did you and your husband assist Father Wirth?
A. One year.
Q. Did Benziger Brothers publish his books at that time?
A. Yes.
Q. Did Father Wirth, to your knowledge, receive money through the United States mails in payment for these books?
A. Yes.
Q. What did he do with that money?

Mr. GLADDEN: Objection raised to the question unless Mrs. Wirth can testify of her own knowledge.

A. I don't know.
Q. Did he to your knowledge lend out money to people in Elizabeth on bond and mortgage?

Objected to by Mr. Gladden.

298 A. I believe he did.
Q. Do you know, of your own knowledge, that Father Wirth loaned money to people in Elizabeth?
A. Yes.
Q. How do you know that?
A. He told me himself.

Q. Who told you?
A. Father Wirth.
Q. Father Augustin Wirth?
A. Yes.
Q. Now, to whom, Mrs. Wirth, did Father Wirth tell you that he had loaned money?
A. Well, Mr. McCahill.

Mr. GLADDEN: I object to the question and move to strike out the answer upon the ground that the witness is testifying from hearsay and not from her own knowledge.

Q. Did Father Wirth tell you how much money he had loaned to Mr McCahill?
A. No.
Q. What did he say regarding the money he had loaned to him?
A. He wished us to have the money.
Q. Are you repeating what he said to you?
A. He said for Mr. McCahill to give us the money.

Mr. Gladden objects as previously.

Q. Is your son connected with the Catholic Church?
A. Yes.

Mr. GLADDEN: I move to strike out this evidence on the ground that it is clearly irrelevant, incompetent and immaterial, and has nothing to do with the issues of this action.

Q. In what capacity is your son connected with the Catholic Church?
A. He is a Prefect of the Benedictine Order at St. Anselms College, at Manchester, New Hampshire.

Mr. Gladden objects as previously.

Q. Is he a Priest or a Layman?
A. Well, he is to be ordained a Priest.
Q. When?
A. 29th of June of this year.

Mr. GLADDEN: This testimony is taken subject to the objections already made on the ground that it is clearly irrelevant, incompetent and immaterial, and has nothing to do with the issues of this action.

Q. Is he to be ordained a Priest of the Benedictine Order?
A. Yes.
Q. Is that the Order with which Father Augustin Wirth was connected?
A. Yes.
299 Q. Did Father Wirth know of your son's decision to enter the Benedictine Order?
A Yes.
Q. Did Father Wirth express himself to you on the subject?
A. Yes, but he wasn't in favor of it.

Same objection by Mr. Gladden.

Q. Did you ever talk with Father Wirth regarding his affairs?
A. Yes, quite often.

Same objection by Mr. Gladden.

Q. Do you recall a particular conversation which you had with Father Wirth regarding the writing and publishing of his various books?
A. I do.

Mr. GLADDEN: It is inadmissible because it pertains to the conversation of a deceased person, and I ask that an exception be noted of this line of testimony on the same ground.

Q. I wish you would repeat, Mrs. Wirth, as near as possible, just what Father Wirth told you in regard to this matter.
A. About the books?
Q. Yes.

Same objection and exception by Mr. Gladden.

A. He said he had the permission of the Bishop and the Abbot to write all the books he liked, provided he did not touch the church money.
Q. What Abbot?
A. Abbot Hilary Pfraengle.
Q. Was Abbot Hilary Pfraengle Father Wirth's immediate superior at that time?
A. He was.
Q. What else did he say regarding this matter, do you recall?

Same objection and exception to all this testimony by Mr. Gladden.

A. That he could do with the money what he liked—the money he earned with his books.
Q. That who earned with his books?
A. Father Augustin Wirth.
Q. Did Father Wirth tell you to whom he had instructed Mr. McCahill to pay the money that he had loaned to him.
A. Well, to us.
Q. Did he tell you that?
A. Yes sir, to his nephew.
Q. Were you present?
A. Yes, I was.

300 Cross-examination.

By Mr. GLADDEN:

Q. Did you ever receive any of that money which you stated that Father Wirth told McCahill to pay to you?
A. No.

Redirect examination.

By Mr. HAYES:

Q. Are you familiar with the hand writing of Father Wirth?
A. Yes.
Q. Did you ever see him sign his name?
A. Quite often.
Q. I hand you this paper and ask you whose hand writing it is?
A. That is Father Augustin Wirth's hand writing. I ask that this letter be marked for identification.

It was so marked.

ELIZABETH J. WIRTH.

PATRICK KENNEDY, called and sworn as a witness for defendant, testified as follows:

Direct examination.

By Mr. HAYES:

Q. What is your address Mr. Kennedy?
A. 917 Magnolia Avenue, Elizabeth, N. J.
Q. What is your full name?
A. My name is Patrick Kennedy.
Q. Mr. Kennedy, did you know Father Augustin Wirth?
A. I did.
Q. How long did you know him prior to his death?
A. I should judge about seventeen years.
Q. Did you, during Father Wirth's lifetime, transact any business for him?
A. I did.
Q. What was the nature of that business?
A. I handled a loan book for him for about four or five years.
Q. What do you mean by handling a loan book?
A. He had a loan book.
Q. Do you mean a building and loan book. Did you pay the dues on it.
A. I paid the dues on it for four or five years; of course he sent me the money.
Q. Did you receive through the United States mails a letter from Father Wirth?
A. I did sir, and cannot say how many.
Q. I hand you this paper, Mr. Kennedy, and ask you if you received it through the United States mails?
A. I did.

301 I offer this letter in evidence.

SPRINGFIELD, BROOM CO., MINN.,
July 23*rd*, 1900.

Mr. Patrick Kennedy,

DEAR SIR: Please give my B. & L. Assoc. book over to Mr. Hall. I have made arrangements to withdraw my money. It does not

pay to let it stand much longer. I have paid in $660, in eleven years and the whole amounts only to $893. I can do better with it.

Respectfully yours,

AUGUSTIN WIRTH.

No Objection by Mr. Gladden.

Q. Did you do as directed by Father Wirth in that letter?
A. Yes, sir.
Q. Did you turn over the building and loan book to James W. Hall?
A. Yes, sir.

PATRICK KENNEDY.

ALFRED MCCAHILL, called and sworn as a witness for defendant, testified as follows:

Direct examination.

By Mr. HAYES:

Q. Mr McCahill, what is your full name?
A. Alfred McCahill.
Q. Did you know Father Augustin Wirth during his lifetime.
A. I did.
Q. How long did you know him?
A. I have known him for some time.
Q. You were friendly with Father Wirth, were you?
A. Yes.
Q. Did you at any time assist him in the publishing of his books?
A. No.
Q. Did you have any business transaction with Father Wirth?
A. No, except those notes.
Q. What were the notes, Mr. McCahill?
A. Two of five hundred dollars and one of three hundred dollars.
Q. Does this represent money that you had borrowed from Father Wirth?
A. Yes.
Q. Now, Mr. McCahill, before Father Wirth went to Europe in 1897 did you have a conversation with him regarding the payment of these notes.
A. No.

Mr. GLADDEN: I move to strike out this evidence on the ground that it is clearly irrelevant, incompetent and immaterial,
302 and concerning the declaration of a deceased person—there being no other person present.

Q. Did Father Wirth at any time tell you to whom this money was to be paid?

Objected to by Mr. Gladen on the same ground.

A. No he did not.
Q. Do you recall, Mr. McCahill, telling me in our conversation on Friday last regarding this matter as follows: "Before Father

Wirth sailed for Europe I asked him to whom I should pay the interest and the principal on the notes. He replied, give it to my nephew, Florian"?

A. No.

Mr. GLADDEN: I object to the question and move to strike out this evidence on the ground that the question is an attempt on the part of the counsel to testify himself.

Q. You do not?

A. No.

Q. Did you have any understanding with Father Wirth regarding the payment of this money?

A. I cannot say that I did.

Q. What was your understanding as to whom this money was to be paid?

A. To be paid to him in full.

Q. You mean by him of course Father Wirth?

A. Yes.

Q. But you had no understanding with him before he went to Europe?

A. No, not on this money.

Mr. GLADDEN: I move to strike out this evidence on the ground that it is clearly irrelevant, incompetent and immaterial, and has nothing to do with the issues in this case and concerning alleged conversation with a deceased person, not in the presence of a third party.

Q. I ask you, Mr. McCahill, if you had borrowed from Father Wirth any other money besides the $1,300 to which you have testified.

A. No.

Q. Do you owe him any other money?

A. No.

Q. Do you know Florian Wirth?

A. Yes.

Q. How is he related to Father Wirth?

A. He is Father Wirth's nephew?

Q. Do you know Florian Wirth's wife?

A. Yes.

Q. Do you know that Florian Wirth has a son about to enter the Order of St. Benedictine.

A. Yes.

Q. Did you have any conversation regarding this son with Father Augustin Wirth?

Same objection by Mr. Gladden.

A. No.

Q. Never had?

A. No.

303 Cross-examination.

By Mr. GLADDEN:

Q. In regard to the $1,300, Mr. McCahill, has that sum or any portion of it been paid to Mr. Wirth?
A. No.
Q. Is it still due and owing to Father Augustin Wirth or his Estate?
A. Yes.

Redirect examination.

By Mr. HAYES:

Q. When did you last see either Florian Wirth or his wife?
A. I think it was last week.
Q Have you seen them since my last visit here?
A. Yes.
Q. Did you talk with them about those notes?
A. I think that I told her that I owed the $1,300.
Q. Did you tell Mrs. Florian Wirth that Father Augustin Wirth had instructed you to pay the $1,300 to Florian Wirth?
A. I may.
Q. During your last conversation with Florian Wirth and his wife, regarding the $1,300 loan, who was present?
A. I don't know,—I don't think there was anybody.
Q. Where did the conversation take place?
A. In their own house.
Q. To whom were you talking?
A. To Mrs. Florian Wirth.
Q. And you did not tell her that Father Wirth instructed you to pay the $1,300 to her husband?
A I don't think I did.

ALFRED McCAHILL.

It is Hereby Stipulated and Agreed, that the testimonies of Elizabeth J. Wirth, Patrick Kennedy and Alfred McCahill, may be taken in this case before William H. Ryan, Esq., a Notary Public; that the minutes of the same may be taken down in shorthand by F. P. Worster, notwithstanding the fact that she is employed in the office of the Solicitor for the Defendant.

____ ____,
Solicitor for Complainant.

____ ____,
Solicitor for Defendant.

STATE OF NEW JERSEY,
County of Union, ss:

I, William H. Ryan, a Notary Public, duly qualified for and residing in the County of Union, do hereby certify that Elizabeth J. Wirth, Patrick Kennedy and Alfred McCahill, were by me first duly sworn, to testify the truth, the whole truth, and nothing but

the truth, and the depositions by them given, as above set
304 forth, were reduced to writing by F. P. Worster, who is not interested in the suit, and who is not Attorney for or related to any party of said suit, in my presence, and in the presence of the witnesses, and was taken at the place first herein specified.

And I further hereby certify that I am not Attorney for or related to any party to said suit, or in any way interested in said suit.

[NOTARIAL SEAL.] W. H. RYAN,
Notary Public, Union County.

Endorsed: Depositions of Elizabeth J. Wirth, Patrick Kennedy and Alfred McCahill. Taken at Elizabeth, N. J. May 21st, 1909. Filed May 12, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States Circuit Court, Southern District of New York.
LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of AUGUSTIN WIRTH, Deceased, Defendant.

STATE, COUNTY AND SOUTHERN
District of New York, ss:

Deposition of Rev. Ernest Helmstetter, taken before me, C. G. Shumway, a Notary Public, within and for the County of New York, in the City of New York, pursuant to oral stipulation of the attorneys for the respective parties, personally appearing before me, as hereinafter recited, which said deposition was taken, by consent, at the office of Frank W. Arnold, Esq., solicitor for the complainants, in the said County and State of New York, on the 7th day of May, 1910, at 10:30 o'clock in the forenoon of said day, to be read in evidence upon the trial of that certain action now pending undetermined in the Circuit Court of the United States within and for the Southern District of New York, wherein said Louis G. Benziger and Nicholas C. Benziger are complainants, and Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, is defendant.

Appearances:

Frank W. Arnold, Esq., Solicitor for Complainants.
Charles L. Burr, Esq., Solicitor for Defendant, John G. Dyer, of Counsel.

United States Circuit Court, Southern District of New York.

305 LOUIS C. BENZINGER and NICHOLAS C. BENZINGER, Complainants,
against
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Defendant.

Rev. ERNEST HELMSTETTER, called and sworn as a witness for the defendant, testified as follows:

Direct examination.

By Mr. DYER:

Q. What is your name?
A. Ernest Helmstetter.
Q. Where do you live?
A. Newark, New Jersey, 528 High Street.
Q. Are you an ordained priest of the Catholic Church?
A. I am.
Q. What is your position in the Church at the present time?
A. Abbot of *of* St. Mary's Abbey, Newark, New Jersey.
Q. Are you a member of the Order of St. Benedict?
A. I suppose so, as Abbot I ought to be.
Q. What is your present position in the Order of St. Benedict?
A. Position of Abbot, head of the Order for this district.
Q. What do you mean by this district?
A. Well, all the different places belonging to St. Mary's Abbey in Newark.
Q. Then you are the head of the Order of St. Benedict in the State of New Jersey?
A. Not only in New Jersey.
Q. Where else?
A. New Hampshire, wherever any of our fathers are belonging to the Abbey.
Q. Does that mean in the United States?
A. I could handle a subject in any part of the United States, yes.
Q. Well, are there other branches of the Order of St. Benedict in the United States?
A. Oh, yes, we have nine different Abbeys belonging to the congregations that we formed.
Q. What is the supreme authority in the Order of St. Benedict?
A. The Abbot, or rather, the Pope has Supreme authority.
Q. What is the actual governing supreme authority that handles the business?
A. For each Abbey the Abbot. Each superior Abbey has its own Abbot.
Q. Then that Abbot has charge of the district or territory?
A. Is not circumscribed by any territory. Where the subject of the Abbey is the Abbot has jurisdiction over them there.

306 Q. I see. Did you know, Father Augustin Wirth?
A. I did, yes.
Q. Was he to your knowledge a member of the Order of St. Benedict of New Jersey?
A. He was, yes.
Q. Was he at all times during his life a member in good standing of that Order?
A. Always, yes.
Q. Do you know whether or not Father Wirth wrote certain books with the permission of the Abbot?
A. I do, yes.
Q. Do you know whether or not he wrote those books for his personal gain?
A. He did not because none of us can do anything for our own personal gain. He wrote them for the benefit of the community?
Q. What right or claim would the community have to the profits arising from the sale and publishing of his books?
A. They would have full claim to everything coming from them.
Q. Why?
A. Because of the contract that he enters into when he becomes a member of the Order.
Q. Will you outline in a few words the general context of that contract?
A. Well, our statutes that I believe you have a copy of tells you that distinctly. We have the man to support on our part and we get all that comes to them. We have to support them and whatever they earn they turn over to us.
Q. Now as a matter of fact, during his lifetime Father Wirth collected profits from the sale of his books, did he not?
A. No he would collect it and turn it over, or with permission of the Superior, put it to other use. He had to have the permission of the Superior to do so if he wanted to use it for anything else.
Q. Do you know whether or not Father Wirth received the permission of his Superior to use the moneys arising from the sale of his books for his own purposes?
A. Now, that is more [that] I can tell you. I understood he had permission, but would not know of my own knowledge because that is between himself and his Superior.

By Mr. ARNOLD: I move to strike out the answer on the ground that the witness has no personal knowledge of the facts.

Q. How long have you been Abbot, Father?
A. Since I was elected on the 4th of January of this year.

By Mr. ARNOLD:

Q. What was the date of Father Hilary's death this year?
A. The 21st of December.
[A.] The 21st of December?
A. Yes.
307 [A.] 1909?
A. Yes.

By Mr. DYER:

Q. Since you have been Abbot have you received from any source whatever moneys which were due and owing to Father Wirth in his lifetime on any business transactions of his?

A. I received one payment of interest on a note made by Mr. Alfred McCahill of Elizabeth.

Q. How much was that payment?

A. $39.

Q. When Mr. Cahill paid you that money did you have any conversation with him?

A. Not at all. He sent it to me by mail.

Q. Did he send a letter with it?

A. No more than stating that he enclosed the interest due, that is all.

Q. Was this interest money due upon a note held by McCahill of Father Wirth's?

A. No, I hold the note against McCahill.

Q. You hold the note against McCahill? The note is now in your possession?

A. It is, yes.

Q. What is the substance of that note?

A. Well, any ordinary note that is formed.

Q. That is?

A. That he will pay to the Order of St. Benedict of New Jersey stating the amount. There are exactly three notes, a large one, I forgot the exact amount, but there are three notes. The entire interest amounts to $39, for a half year.

Q. Are these notes made payable to Father Wirth or are they made payable to the Order?

A. They are made payable to the Order now, the original note was made payable to Father Augustin Wirth.

Q. You say there are three of those notes?

A. Yes, as I remember.

Q. And they are now in the possession of you as Abbot of the Order of St. Benedict.

A. They are, yes.

Q. Have you collected any interest or payments on the other two notes?

A. Well, this is the interest covering three notes.

Q. That is, the $39. is the interest on all three notes?

A. On all three notes.

Q. Did McCahill obtain the money from Father Wirth personally?

A. I don't know. I really don't know what the transaction was.

Q. How did those notes come to be in your possession?

A. Well, after his death (by his death meaning Father Wirth's) they were all sent to us.

Q. How were they sent, Father?

308 A. By mail, I suppose. Probably Abbot Hilary received them and he had them in his possession.

Q. You don't know, then, how Abbot Hilary got possession of those notes, do you?

A. I do not.

Q. Then when those notes are due you expect full payment from McCahill to the Order, do you?

A. I suppose so, if he is ever able to pay them.

Q. Do you know McCahill personally?

A. Well, he attends one of my churches in Elizabeth, I know him so far.

Q. During his lifetime Father Wirth loaned to Patrick J. and Alice Kelly, his wife the sum of $2,500 on bond and mortgage. In a transaction such as this would he have to have the permission of the Abbot?

A. He should have it, yes.

[*A.*] Would the money so invested by him without the permission of the Abbot be considered his own money?

A. Never.

Q. No matter from what source he had obtained that money.

A. No matter from what source. Even if he had inherited it.

Q. Then money that would be inherited by a member of your Order becomes the property of the Order immediately by reason of the fact that the person who inherits the money is a member of your Order?

A. It does.

Q. Under what claim of right is that, Father.

A. Well, the contract that is formed when they enter the Order.

Q. That is, practically because of his oath which he takes when he joins the Order?

A. Yes.

Q. Now, then, if a priest were to leave your Order, either with permission or be dismissed because of infractions of your rules, or other causes, would the Order have any claim to his estate?

A. The claim would continue according to the Church laws.

Q. By the Church Law do you mean the Canon Law, or do you mean the law of your Order?

[—.] No, the Canon Laws of the Church.

By Mr. ARNOLD:

Q. Your Order is governed by that, is it a fact?

A. Certainly.

By Mr. DYER:

Q. Father, have you received from any other sources moneys due anw owing to Father Wirth in his lifetime from any transactions whatever?

309 A. Not since I am Abbot, except what was mentioned, the interest.

Q. Do you know, Father, as Abbot, whether or not your order has received since the death of Father Wirth moneys that would have been paid to him personally in his lifetime?

By Mr. ARNOLD: I object to that on the ground that it is speculative.

A. Well, I as Abbot received the $39. Father Hilary I suppose testified to what he received.

Q. Did you ever have any conversation with Father Wirth in his lifetime about the profits of the moneys arising from the publishing and sale of his books?

A. I did not, no.

Q. Did you ever have any conversation with Father Wirth in his lifetime about any other business transactions of his?

A. No, because those things are always settled with the Superior.

Q. But then, Father, as Abbot of the Order of St. Benedict at the present time you claim the right and title to any estate, moneys or other valuables which Father Wirth left or dies possessed of?

A. Certainly, I claim all. Have to.

Q. You claim those things by virtue of the fact that he was a member of your Order?

A. I do, yes.

Q. Do you know Thomas J. Keogh and Edward J. Keogh?

A. I knew them in Elizabeth, yes, years ago.

Q. Do you know whether they have in their possession any money, notes, mortgages or other things of value belonging to Father Wirth?

A. I do not.

Q. Do you know if they have ever paid to the Order since the death of Father Wirth any sums of money?

A. That is more than I can tell, I don't know.

Q. Would you be in a position to know?

A. Well, I could hunt up in the books and find out.

Q. Have you any knowledge of the sources from which Father Wirth obtained the moneys that he loaned in his business transactions?

A. I have not.

Q. Do you, as Abbot, at the present time know of any claim that was made by Father Wirth in his lifetime to the profits arising from the publishing and sale of his books and from his other business transactions?

A. I do not.

Q. You would be in a position to know if he had made such a claim, would you not?

A. Surely not, except that I look through all the old letters and look through things of that kind. I don't know what things were between himself and the Abbot.

310 Q. If a member subject to the dominion of the Abbot at Newark were to hold or obtain property of any description whatever in any state of the United States would that property become the property of the Order?

A. It would.

Q. And would it become such property of the Order by virtue of the fact of vows which the possessor took?

A. It would.

Q. You from your position that you hold are fully competent to state these facts as facts?

A. I am, yes.

Q. Now, do you know whether or not the Order has collected from Benziger Brothers since the death of Father Wirth certain profits arising from the publishing and sale of his books?

A. I believe that was all testified to.

Q. Will you answer more fully, Father?

A. I know it from the testimony that was given by Abbot Hilary. I have read the testimony. I have a copy of it.

Q. Would you not also know that from the fact that you have charge of the Order.

A. I would not know it.

Q. Then it is a fact that you know the Order has received payments from Benziger Brothers on the contract for the publishing and sale of Father Wirth's books?

A. Yes, I know that we received payment for some of it.

Q. Under the Laws of your Order would the heirs, the legal heirs, of any member of your Order be entitled to receive any property which he might have in his lifetime, or inherit in his lifetime?

A. They would not.

Q. The Order would become the sole owner of that property?

A. They would become the sole owners, yes.

Q. Under the Canon Law of the Church?

A. Well, under the agreement that he signed when he became a member.

Q. Besides the payments from Benziger Brothers and from McCahill, do you know of any other moneys, property mortgages or valuables, now in the possession of the Order of St. Benedict, received after the death of Father Wirth?

A. I do not.

By Mr. ARNOLD:

Q. You mean personally?

A. Personally I do not.

By Mr. DYER:

[—.] Do you know a man by the name of Ryan who appears by the records of the County Register of Union county, New Jersey, as the assignee of a certain Mortgage made to Father Wirth?

A. No, sir, I do not.

Q. You have not received any payments from Ryan?

A. We have not, I am sure of that.

311 Q. You have testified, Father, that you have not received any payments on notes held by Thomas J. and Edward J. Keogh.

A. Not to my knowledge.

Q. Do you know whether or not you have those notes in your possession as Abbot?

A. I never saw them.

STATE AND COUNTY OF NEW YORK, *ss:*

I, C. G. Shumway, a Notary Public duly qualified for and residing in the County of New York, do hereby certify that Rev. Ernest Helmstetter was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth, and that his deposition above set forth was taken by me in shorthand and subsequently reduced to writing and that the signing of said testimony was by the attorneys for the parties hereto waived, and further it was agreed that the fact that I was a stenographer in the employ of the Solicitor for the defendant did not in any way disqualify me from taking said deposition.

Dated May 7/10.

C. G. SHUMWAY,
Notary Public, New York County.

Endorsed: Deposition of Rev. Ernest Helmstetter. Taken at New York City, May 7, 1910. Filed May 12, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

United States Circuit Court, Southern District of New York.

LOUIS G. BENZIGER and NICHOLAS C. BENZIGER, Complainants,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Defendants.

It is hereby stipulated and agreed that the testimony of Florian Wirth and Patrick H. Gilhooly may be taken in this case before a Notary Public of the State of New Jersey, pursuant to the old stipulation of the attorneys of the respective parties.

Appearances:

Charles L. Burr, Esq., Solicitor for Defendant, John G. Dyer, of Counsel.
Frank W. Arnold, Solicitor for Complainants.

State of New Jersey,
County of Union, ss:

Depositions of Florian Wirth and Patrick H. Gilhooly, taken before me, Albert H. Hunter, a Notary Public of the State of New Jersey, to be read in evidence upon the trial of certain actions now pending undetermined in the Circuit Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Minnesota.

Florian Wirth, called and sworn as a witness for the defendant, testified as follows:

Direct examination.

By Mr. Dorr:

Q. What is your full name?
A. Florian Wirth.
Q. Where do you live?
A. 915 Magnolia Avenue, Elizabeth, New Jersey.
Q. Did you know Augustus Wirth, deceased?
A. Yes.
Q. How long did you know him?
A. I knew him personally since 1901.
Q. Were you a relative of his?
A. He was a brother of my father.
Q. Do you recall ever having had any business with Father Wirth?
A. Yes, personally.
Q. Did you ever do any work for Father Wirth?
A. Yes.
Q. What kind of work did you do for him?

Mr. Stevens: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. I packed books for him.
Q. What else did you do in connection with these books?
A. I put them in the post office and put stamps on them.
Q. Where did you send these books? books?
A. He sold them all over. I didn't sell them. He sold them.
Q. Did you ever collect any moneys for these books?

Mr. Stevens: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. No sir.
Q. Did you ever have anything to do with the sale and publishing of these books?
A. No sir.
Q. Did you ever have any conversation with Father Wirth in his life time about the moneys that he received from the sale of his books?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. Yes sir.

313 Q. Will you tell us what that conversation was?

A. He told me a few times that he writes them books in his old days so he has money to live on.

Mr. ARNOLD: I move to strike out the answer on the ground that it is irrelevant, incompetent and immaterial.

Q. Did he tell you at any time that the money arising from the sale of these books was his own?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial, and as a statement of a conclusion of law.

A. Yes, sir.

Q. Did you ever have any conversation with Father Wirth about the order of St. Benedict of New Jersey?

A. No sir.

Q. Did you ever have any conversation with Father Wirth concerning the right of the order of St. Benedict of New Jersey to receive the proceeds from the sale of his books.

A. No sir.

Q. You have testified that Father Wirth told you that the moneys he received from the sale of these books was his own?

A. That's what he said.

Q. How did he come to say that to you?

A. We had some talk about it. He said the Abbot would not allow it. Afterwards he went to the Bishop and he allowed it and Abbot allowed it too.

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

Q. Who was the Abbot you speak of?

A. Hilary Pfraengle. He is dead now.

Q. Do you know that he is dead?

A. Yes.

Q. Who was the Bishop you speak of?

A. Bishop Wigger.

Q. Of what district was the bishop?

A. He was Bishop of the Diocese of Newark. He is dead too.

Q. You know that he is dead?

A. Yes.

Q. Were you present at any conversation between Father Wirth, the Abbot and the Bishop?

A. No.

Q. Did you have any conversation with either the Abbot or the Bishop with reference to the publishing of Father Wirth's books?

A. No.

Q. Just how was it that Father Wirth spoke to you about the Abbot and the Bishop giving him permission to publish his books?

A. Well, we had some talk about it and he said that.

314 Mr. ARNOLD: I move to strike out the answer on the ground that it is irrelevant, incompetent and immaterial.

Q. Will you detail as fully as you can all the conversation about which you speak?

A. That is what he said—that the abbot would not allow it at first and afterwards the bishop and then they allowed it to him to write them books, all he wants to.

Q. Did he tell you that they had allowed him to have the proceeds of the sale of those books?

A. He didn't say anything about it. He would not explain himself about his business.

Q. Did you know Alfred McCahill?

A. Yes.

Q. Did Father Wirth ever have any conversation with you about some notes of his that McCahill held?

A. He said that to my wife, not to me.

Q. When did he say it to your wife?

A. That was the year he resigned here.

Q. What do you mean when you say that?

A. Well, he told it to my wife.

Mr. ARNOLD: Objected to on the ground that it is hearsay and not the best evidence. His wife should be produced.

Q. Were you present when he told your wife.

A. No.

Q. What did your wife tell you about these notes?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. She told me that Father Wirth told her them notes should belong to me (meaning the witness).

Q. Do you know what has been done with those notes?

A. No.

Q. Did Father Wirth ever at any time promise you personally to leave you any part of his estate.

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. No sir.

Q. Do you know of any business dealings between Father Wirth and Thomas J. Keogh and Edward J. Keogh?

A. Father Wirth told me he gave Mr. Keogh some money to buy two houses—if I am right it was $1,400. He took off them on account four lots.

Q. Will you explain to us fully what you mean by that?

A. He gave them money to buy two houses.

Q. What do you mean about the four lots?

A. You see Keogh had four lots and he (meaning Father Wirth) took them four lots for $800.

315 Q. That is he took those four lots as security for the $1,400?

A. Yes.

Q. Do you know whether or not Mr. Keogh ever paid back to Father Wirth the $1,400?

A. I don't know.

Q. Did you ever have any conversation with Mr. Keogh about the $1,400. you speak of?

A. No—I could not do that. I had no authority to ask about it and I did not care to ask about it.

Q. Did Father Wirth live at your house?

A. No.

Q. Do you know when Father Wirth used to do the work of writing his books?

A. Yes.

Q. When?

A. The first time I saw him in 1881.

Q. What time of the day did he write his books?

A. Most of the time nights, sometimes in the day.

Q. Did he do the greater part of his work at night-time?

A. The neighbors told me that at any time they looked up at his house in the night they saw him standing beside the desk.

Q. Do you know whether Father Wirth personally received the moneys from the sale of his books during his lifetime?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. Yes, sir.

Q. Did he ever tell you how he intended to use the money which he got from the sale of his books?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. He said that the money would keep him in his old age.

Q. Did he ever speak to you about any claim whatever of the Order of St. Benedict of New Jersey upon or to the money which he received from the sale of his books?

A. No sir.

Q. Do you know whether or not Father Wirth considered that the money he got from the sale of his books was his own personal property?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial, and calls for the conclusion of Father Wirth as to the legal effect of a contract.

A. Yes sir.

Q. How do you know that?

A. He told me.

Q. On how many occasions did he tell this to you?

A. I think it was only once or twice that he spoke about it.

Q. Are you sure it was more than once?

Mr. ARNOLD: General objection to all this line of testimony.

A. Yes.

316 Q. Did Father Wirth ever tell you that the money he got from the sale of his books was his own?

Mr. ARNOLD: Same objection.

A. Yes sir.

Q. Did he ever tell you that the Abbot of the Order of St. Benedict and the Bishop had given him permission to write these books for his own profit?

Mr. ARNOLD: Same objection.

A. There was nothing said about profit.

Q. Did he ever tell you that the abbot of the Order of St. Benedict of New Jersey and the Bishop of Newark, Wigger, allowed him to have the proceeds of the sale of his books as his own personal property?

A. No sir.

Cross-examination.

By Mr. ARNOLD:

Q. How old are you Mr. Wirth?

A. Fifty-four years.

Q. You have testified to conversations with Father Wirth. They took place in what years?

A. 1896.

Q. Any other years?

A. No other year.

Q. And the conversations took place where?

A. In the parish house, in Elizabeth.

Redirect examination.

By Mr. DYER:

Q. You are the husband of Elizabeth J. Wirth.

A. Yes sir.

Q. Have you a son who is a member of the Order of St. Benedict of New Jersey?

A. Yes.

Q. He is an ordained priest in the Catholic Church?

A. Yes sir.

Q. Do you know of any other business transactions of Father Wirth?

A. No, I don't know of any. What the other people say I cannot swear to.

Q. Have you ever had any conversation with Mr. McCahill about the notes left in his possession by Father Wirth?

A. My wife did. He was in my house.

Q. Were you present then?

A. No sir.

Q. Do you know how much these notes are?

A. I could not say. They tell me about $1,300, but I don't know.

PATRICK H. GILHOOLY, called and sworn as a witness for the defendant, testified as follows:

Direct examination.

317 By Mr. BURR:

Q. What is your full name?
A. Patrick H. Gilhooly.
Q. Where do you live.
A. At 1003 North Broad St., Elizabeth, New Jersey.
Q. Did you know the Rev. Father Augustin Wirth in his life time?
A. I did.
Q. How long did you know him?
A. I should say about twenty years.
Q. Did you ever have any business relations with him?
A. Yes, I invested some money for him.
Q. In what did you invest that money?
A. In mortgages.
Q. Can you tell us fully about his investments?

Mr. ARNOLD: Objected to on the ground that it is irrelevant, incompetent and immaterial.

A. My records show that I placed two mortgages for him, the first on June 13th, 1883, upon the property of Morris Cohen and his wife, at 458 Bond Street, in Elizabeth. This mortgage was for $2,400. The mortgage was made to the Rev. Augustin Wirth; the second mortgage was by Patrick J. Kelly to the Rev. Augustin Wirth, dated July 20th, 1893, upon property at 127-129 Fifth St., Elizabeth, N. J., for $2,500. Father Wirth assigned the Cohen mortgage to me on January 28th, 1895, and the Kelly mortgage to John Ryan of this City on March 16th 1895. For the Ryan assignment I presume he received the consideration at the time of the assignment. The assignment of the Cohen mortgage was made to me for the purpose of foreclosure proceeding as Father Wirth did not wish his name to appear in the court proceedings. I foreclosed the mortgage and before the sale took a deed from Cohen and his wife. The interest was paid to Father Wirth up to 1900. On September 3rd 1895 he was about to take a trip to Europe, and I gave him a check for $444., dated October 20th 1897, which check I produce. and a check for $300 to his order and endorsed by me. On November 6th, 1900, I gave him a certified check for $1,854. The balance of the principal and interest in my hands for his account. Besides the checks I have a voucher for each of these payments. (Mr. Gilhooly produced checks and vouchers). Those are all of the financial transactions I ever had with Mr. Wirth, and are all that I can find any record of.

Q. Did you ever handle any other personal business for Father Wirth?

A. None.

Q. Did you ever have anything to do with the work of publishing Father Wirth's books?

A. No.

Q. Did you ever draw any contracts for him?

318 A. No.

Q. Did you ever do any other legal work for him besides these mortgages?

A. No.

Q. Did you ever have any conversation with Father Wirth about the sale of his books or the profits arising from the sale of his books?

A. No. He was quite friendly and came in here often, but nothing was said about his books except that he was publishing them. Nothing was said of his business relations.

Q. In the transactions concerning these two mortgages you spoke of did Father Wirth ever [made] any statement concerning the possibility or the right of a claim by the Order of St. Benedict of New Jersey to the property?

A. No he never spoke to me about it. I am not of the same religion as Father Wirth so we were not disposed to talk on topics of religion.

Q. Did you ever transact any business for Father Wirth between himself and the Order?

A. No.

Q. When Father Wirth asked you to invest this money did he make any statement to you that it was his own money he was investing.

A. There was nothing said one way or the other. There was nothing said that would lead me to believe that anyone else had any interest in the money.

Q. Did Father Wirth ever say anything to you about the disposition of his estate after his death.

A. Never.

Cross-examination:

None.

Redirect examination.

By Mr. DYER:

Q. These mortgages you speak of, are they cancelled of record.

A. Yes, they were paid long ago and cancelled by the assignee.

STATE OF NEW JERSEY,
County of Union, ss:

I, Albert F. Bender, a Notary Public of the State of New Jersey, duly qualified for and residing in the City of Elizabeth, in the County of Union and State of New Jersey, do hereby certify that Florian Wirth and Patrick H. Gilhooly were by me first duly sworn to testify the truth, the whole truth and nothing but the truth and the depositions by them given, as above set forth, were reduced to

writing by me; that I am not interested in this suit and am not attorney for or related to any party to said suit; that said depositions were taken in the City of Elizabeth, County of Union and
319 State of New Jersey, at the Office of P. H. Gilhooly. And I further certify that said depositions were taken by me in shorthand, and, with the consent of the attorneys present, transcribed by me and that the signing of the same when so transcribed was waived by said attorneys.

Dated the 6th day of May, 1910.

[NOTARIAL SEAL.] ALBERT F. BENDER,
Notary Public of New Jersey.

Endorsed: Depositions of Florian Wirth, Patrick H. Gilhooly. Taken at Elizabeth, New Jersey May 6th, 1910. Filed May 12, 1910. Henry D. Lang, Clerk, by Mamie A. Carlson, Deputy.

United States Circuit Court, District of Minnesota, Second Division.

No. 177.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
vs.
ALBERT STEINHAUSER, Administrator, etc., Defendant.

This case presents a controversy in which the complainant claims that the property left by Augustin Wirth, at his death belonged to it, because he lived and died a member of the Order of St. Benedict. The defendant claims that for various reasons the property belongs to the heirs at law.

That the documents offered in evidence to show that Wirth belonged to the Order of St. Benedict, and that he had transferred his stability to the plaintiff, the Order of St. Benedict of New Jersey, were duly executed by Wirth, was admitted at the argument. Even without this admission the authenticity of the documents was sufficiently proven. From them it appears that Wirth became a member of the Order of St. Benedict at the monastery of St. Vincent in Pennsylvania, on August 15, 1852, and on May 1887, being still a member of the Order, he transferred his stability from the abbey of St. Benedict in Kansas to the Abbey of St. Mary, Newark, New Jersey and therefore to the Order of St. Benedict of New Jersey the complainant in this cause. Wirth died at Springfield, Minnesota, December 19, 1901. Some suggestion was made during the taking of the evidence and in the briefs of the defendant to the effect that Wirth in moving to Minnesota ceased to be member of the Order of St. Benedict, and ceased to belong to the complainant corporation. I find as a fact, however, that at the time of his death he still remained a member of the Order. Hoerr, a witness for the
320 defendant testified, (Defendants' Record 149-150) that he saw Wirth about a year before his death at Mankato, Minnesota, wearing the habit of the Order of St. Benedict. A receipt

was introduced in evidence, (Defendants' Record page 152) dated Springfield, Minnesota, January 2, 1900, signed by Father Wirth, and to his signature he added the letters O. S. B. He also made a financial report of the church St. Raphael, Springfield, Minnesota of which he was then in charge, from January 1, 1900, to January 1, 1901, to which he signed his name as Augustin Wirth O. S. B.

There is not-ing to contradict the almost conclusive evidence furnished by this testimony and these documents. Dying within the Order, it follows that he was also a member of the complainant corporation, for there is nothing to show that he had transferred his stability from the Order of St. Benedict of New Jersey to any other monastery, although there was at the time in Minnesota a monastery of the Order at St. Cloud.

The first question for consideration is this: What effect upon his rights to property was produced by his joining the Order of St. Benedict? When he joined that Order he took the three vows of chastity, poverty and obedience. The only one of these vows which it is necessary to consider in this case is the vow of poverty. The rule of St. Benedict which governed the Order provided in its Chapter 33, as follows:

"The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the Abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for any one to have anything which the Abbot did not give or permit him to have Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if any one should be found to indulge this most baneful vice and having been admonished once and again, doth not amend, let him be subjected to punishment. (Complainant's Record p. 25.)

This rule was in force in New Jersey when Father Wirth became a member of the Order of St. Benedict of New Jersey. The Abbot of St. Mary's testifying with reference to this rule said on page 123 of Complainant's Record "They lived in common with each other and whatever they had the community gave to the monastery,
321 only claiming what they needed of necessity, they have always been taken care of like children of a family.

And again on page 192: "There is no member claims anything as his own, but getting all he needs from the common income that we have. No member can call anything strictly his own, but for subsistence and for all he needs, all necessary things, he depends upon the income of the community at large.

Father Engle, the Abbot of St. John's Abbey in Minnesota testified as to the construction placed by the Canon law upon the vow of poverty and said on page 189 of defendant's Record: "A. As to vow of poverty when this is solemnly made in religious order it incapacitates such a member to possess or acquire property for him-

self and to make independent use of temporal things which can be valued in money."

And again on page 192, "Q. You say that incapacitates members from possessing property or temporal things whose value can be measured in money. Is that a well settled principle of your Canon Law?

A. Yes, sir. Whatever a Monk acquires he acquires for his Monastery.

Q. That, you say, incapacitates a member or Monk from holding property.

A. Yes, in his name and for himself."

The present Abbot of St. Mary's Abbey testified upon this subject as follows: "Q. If a member subject to the dominion of the Abbot of Newark were to hold or obtain property of any description what ever in any state of the United States, would that property become the property of the Order? A. It would. Q. And would it become such property of the Order by virtue of the fact of vows which the possessor took? A. It would."

As a matter of history it is well known that the members of a religious order have no property of their own. This was so universally by the Canon Law, and it is declared to be the municipal law of Spain in the Seven Partidas, compiled and published in 1263, (Laws 2, 13 and 22, Title 7, Partida 1.) Even if a monk did depart from the convent and had charge of a church, he still could acquire no property of his own. (Law 26, Title 7, Partida 1.) How far the civil courts are bound by the Canon Law it is not necessary to inquire, nor is there here any question as to the effect of the judgment of an ecclesiastical tribunal, such as was presented in Watson v. Jones, 13 Wall, 679, cited by the defendant.

322 Evidence as to the vows taken upon joining the Order, and the testimony as to the effect of these vows is important only in the construction of the charter, constitution and by-laws of the Order of St. Benedict of New Jersey.

The complainant here is not the Order of St. Benedict founded about the year 525, which is and always has been a religious order, but the orator in this case is a civil corporation chartered by the state of New Jersey, and known as the Order of St. Benedict of New Jersey. Father Wirth was a member not only of the religious society, but also of the civil society, and the civil society is the entity bringing this suit. Its rights must depend upon the construction given to its charter, constitution and by-laws. If they differ from the rules governing the religious order, the latter must give way. That they do differ with regard to the manner of leaving the Order will be seen later on in this decision.

What then do they provide? The Act of the Legislature of New Jersey incorporating the Order of St. Benedict of New Jersey provides that certain persons named, "and their associates, members of the Society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth" be constituted a body politic under the name above mentioned. (Complainant's Record p. 128.) The

charter also provides that the corporation may "make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to, nor inconsistent with the constitution of the United States or of this State." It also provides "that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof."

The constitution provides, among other things, as follows:

"SECTION II. The object of this corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with principles and general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church."

SECTION X. To become and to be a member of this Corporation it is absolutely necessary—

"1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

323 "To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church.

"SECTION XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for the following up and carrying out of the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey, and no further.

And, moreover, that each member, individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

That the vow of poverty, as understood by the Canon Law, is clearly binding upon members of that civil corporation, appears first, in the charter itself and in Section X of the Constitution which provide that only members of the Order of St. Benedict can become members of the civil corporation; second, by Section 2, of the Constitution which declares that the object of the corporation shall be attained in conformity with the principles and disciplinary statutes of the Order of St. Benedict, and especially, third, by Section 12, of the Constitution above quoted.

All of these provisions were in force when Wirth joined the Abbey of St. Mary's in 1887. By joining the Abbey at that time Wirth

agreed to give to it everything which he then had, and everything which he might thereafter acquire.

The defendant now claims that if that is the proper construction of the contract made between the orator and Wirth when the latter joined the Order, such contract is void on the grounds of public policy.

In order to determine whether this objection to the contract can prevail in this particular suit, it is necessary to consider just
324 how the question arises here. We have not here a case where a member has been expelled, or has voluntarily left the Order and is attempting to recover something that he has paid in; nor is it a case where a member has voluntarily left the Order, where his relations with it have been entirely terminated, and notwithstanding this termination the Order is attempting to compel the member to account for his earnings received after such separation. On the contrary, we have here a case where Wirth lived and died a member of the Order. We have here a case where the Order and Wirth both considered the contract binding upon them up to the time of the death of the latter. I say this, for although there is evidence that the Abbot of St. Mary's and Wirth did not agree, and that Wirth had been reprimanded by Hildebrand of Rome, Abbot Primate; yet, the fact remains that, notwithstanding their differences, he did not separate himself nor attempt to separate himself from the Order, but died within it.

The Order on its part had fulfilled all its obligations to Wirth. It is true, that he did not live in the Abbey or in New Jersey during the last year of his life, nor did the complainant contribute anything to his support, for that was not necessary. As soon, however, as the Abbot of St. Mary's was informed of the sickness of Father Wirth he at once requested the Abbot of St. John's St. Cloud, to give such assistance as was necessary, and the abbot of St. John's sent a member of the Order to Springfield, who reached there a few days before Father Wirth's death. He was buried by the Order at St. John's Abbey in St. Cloud.

So far as the performance of the contract is concerned, this suit presents the case of an executed contract, and not a case of an executory contract. It is thus distinguished from the cases of Hershy vs. Clark, 35 Ark. 17, and Bates Machine Co. vs. Bates, 87 Ill. 225.

The case is simply this: At the death of one who was at the time of such death a member of the Order, there is found in his immediate possession and control certain property, which by the terms of the contract between the members and the Order, belonged to the Order, but had not come into its possession; and the question is, does this property belong to the Order, or to the heirs of the deceased member?

Had such a case arisen in Spain after the promulgation of the Partidas, the monk would have been buried outside of the monastery in some dumping ground, and the money would have been buried with him. In later days however it was held that it was not
325 necessary to bury all the money thus found, but it was sufficient to bury thirty denarii with him. (Law 14, Title 7, Partida 1.)

The claim of the defendant upon the facts hereinbefore set out is that the contract is void, as against public policy. It is in effect a claim that had Wirth before his death paid over to the Order what he received from the sale of his books or for his personal services, his administrator or his heirs could, nevertheless, after his death have maintained an action to recover back the amount so paid and the value of his services.

The defendant says in his brief page 64 "That the alleged contract,—the acknowledgment of the rule of St. Benedict, and the taking of the vow of poverty,—incapaciti-es a member from holding property, and entitled the complainant to demand a recognition of that incapacity in a Court of equity, in the United States in the twentieth century, is a startling proposition; in fact in the face of the principles underlying American institutions, of personal rights so jealously guarded in all our constitutions it is most astounding." To me the astounding thing is, not that it should be claimed that such a contract executed as this was, was valid, but that it should be claimed that it was void. It would seem to me contrary to all sense of justice to say, after a person had joined such an order as this, has unselfishly devoted his life to the charitable purposes of its organization, had worked continually that the money derived from his labors might be used by the society for such purposes, and after it had been so used by it and after the man had died in full communion with the Order, that his heirs, his nephews and nieces could maintain an action to recover from the Order the value of the services of their ancestor. Yet, that must be the result if the contract made between the orator and Wirth was contrary to public policy. That the purposes of the Order are not contrary to public policy can not for a moment be doubted. To doubt upon that point would be to doubt the doctrines of the Christian religion, and the teachings of the moralists of all ages.

The defendant seized hold of some statement made by the experts on Canon Law, to the effect that the vow of poverty incapacitates a man from holding property, and then says that the right to obtain and hold property cannot be divested any more than the right to personal liberty. In this case we are not concerned with the question as to whether a person once a member of the Order of St. Benedict can ever be relieved from the vow which he took on becoming a member. It used to be said that not even the Pope himself could give him dispensation. (Law 3, Title 7, Partida 1.) But
326 this idea has for ages been abandoned, and that he can by the church be relieved from the vows is well settled. The witnesses on canonical law say that he could cease to be a member by secularization or by expulsion, and that this takes place only with the consent of the Order. It is thus seen that a person can be relieved from his vows even by the Canon Law. But the question is, as has been said before, not what were Wirth's relations to the Order of St. Benedict, but what were his relations to the Order of St. Benedict of New Jersey. It is distinctly provided in the constitution of the complainant that a member may voluntarily leave the

Order. Sec. XI of the constitution is as follows: "Membership is lost at once:

2. By voluntarily leaving the Order for any purpose whatsoever."

Wirth could at any time have separated from the complainant. If he had done so the complainant would have had no right to his future earnings. It cannot be said then that the contract entered into between the parties when Wirth became a member of the complainant, forever deprived him of the right of acquiring property, and forever incapacitated him from owning property. He could resume his right to acquire property for himself at any time he chose. With this right of voluntary withdrawal, what ground can there be for saying that the contract of 1887 was against public policy? On principle it is very clear that it cannot be said to be so, and it is equally so on authority. The state of New Jersey having incorporated this society, one of the articles of which states that only members of the Order of St. Benedict can become members thereof, it cannot be said that such an organization as the complainant is contrary to the public policy of the state of New Jersey. The legislature must have known what the religious order of St. Benedict was when it incorporated the Order of St. Benedict of New Jersey.

Cases very similar to the one at bar have been before the courts on several occasions. One of them is Goesele vs. Bimeler, 14 How. 589. In that case the Court said, on page 604: "He then signed the first articles, which, like the amended articles, renounced individual ownership of property, and an agreement was made to labor for the community, in common with others, for their comfortable maintenance. All individual right of property became merged in the general right of the association. He had no individual right, and could transmit none to his heirs. It is strange that the complainants should ask a partition through their ancestor,
327 when, by the terms of his contract, he could have no divisible interest. They who now enjoy the property, enjoy it under his express contract."

And again on page 605: "What is there in either of these articles that is contrary to good morals, or that is opposed to the policy of the laws? An association of individuals is formed, under a religious influence, who are in a destitute condition, having little to rely on for their support but their industry; and they agree to labor in common for the good of the society, and a comfortable maintenance for each individual; and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the community, in sickness and in health, and under whatsoever misfortune may occur. And this is equal to the independence and comforts ordinarily enjoyed."

The same organization was before the court of Ohio in the case of Gasely v. The Separatists Society of Zoar, 13 Oh. St. 144. The contract was held binding against one who having withdrawn sought a division of the property and an assignment to herself of her share.

Schriber v. Rapp 6 Watts, 300 had to do with the Harmony Society. The Court said in that case on page 360:

"As association for the purposes expressed is prohibited neither

by statute nor the common law, and it is clear that, except for the amount of its income, this society would be entitled to a charter by our statute for all incorporation. It may be true that the business and pursuits of its members are incompatible with the customs of the primitive Christians; but that is a matter for the consideration of those who propose to live in conformity to them. Our law permits one to meddle with communities, and religious societies are regarded by them as with an eye to their temporal consequences. It has not been pretended that the society is detrimental to the public or its members. It is an ecclesiastical community, performing with alacrity its duties to its law, rendering unto Cæsar the things that are Cæsar's, and following its municipal rules of property and government, after the models of those Christian societies that existed in the days of the apostles. Its most peculiar features are submission to the will of its founder and an equal participation of property brought in the common stock by individuals, or produced by the labor of the whole."

In the case of Barr v. Trustee Community, 127 N. Y. 246, the court stated the character of the society to be as follows: on page 253, "Necessarily the very proposition of such a community was the absolute and complete surrender of the separate and individual rights of property of its persons entering it; the abandonment of all money, effects, estate, and the investiture of the title to their property and its fruits of their industry in the common body, from which they could not afterwards be severed or withdrawn, except by unanimous consent. It was fashioned altogether according to the extreme idea that all who believed should be together and have all things common."

The Court then said, page 254:

"There were the main features of the organization to which the plaintiff voluntarily became a party. It is not shown or found that he was induced to enroll himself among its members by any fraud or duress; and, in carrying out such a business undertaking, it was not prohibited by any statute or in contravention of any law regulating the possession, assessing or alienation of property. It imposed no unlawful restraint upon the alienation of property, for the title to its real estate could be conveyed at any time by the united action of its members if they so willed it. It was a joint holding of property by the adult members of its community with this qualification, that upon the death or withdrawal of a member no share or interest therein passed to him or his personal representatives, but they who survived or remained continued to hold jointly the entire property in solidum."

In the case of Ware v. Merrill, 4 Bb. 162, the plaintiff withdrew from the community of Shakers, and attempted to recover the value of his services while a member on the ground that his contract of membership was void. The court said on page 118:

"It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the convention only changed the mode in which he chose to exercise and enjoy this right

or power; he preferred that the avails of his industry should be placed in the common fund bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable also to partnerships of one description as well as another.

It is said that the covenant or contract is contrary to genius and principles of a free government, and therefore void." * * *

"In support of this objection, it is contended that the
329 covenant is a contract for perpetual service and surrender of liberty. Without pausing to enquire whether a man may not legally contract with another to serve him for ten years as well as one, receiving an acceptable compensation for his services, we would observe that by the very terms of the fourth and fifth articles, a secession of members from the society is contemplated and its consequences guarded against in the fifth by covenants never to make any claim for their services, against the society."

And again on page 120:

"Again it is urged that the covenant is void, because its consideration is illegal, that it is against good morals and the policy of the law. We apprehend that these objections cannot have any foundation in the covenant itself; for that is silent as to many particulars and peculiarities which the counsel for the plaintiff deems objectionable. The covenant only settles certain principles as to the admission of members; community of interest; mode of management and support; acquisition and use of the property; stipulations in respect to services and claims; professions of a general nature as to the faith of the society, and a solemn renewal of a former covenant and appointment of certain officers." * * * "Now, what is there illegal in its consideration, or wherein is it against good morals or the policy of the law. It does not contain a fact or a principle which an honest man ought to condemn; but it does contain some provisions which all men ought to approve; it distinctly inculcates the duty of honest industry, contentment with competency, and charity to the poor and suffering."

The case of Gass & Bonta v. Wilhite, 2 Dana, Ky. 170, had to do with another community of Shakers. It was held that seceding members had no right in or to the community property. The court said on page 180:

"So long as piety is recognized, by common assent, and by the legislature, as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it. In legal estimation, it must be viewed, as what is not only estimable in itself, but as an appurtenance to the characters of individual citizens, of great value to society, for its tendency to promote the general weal of the whole community. By the common assent of men in all time, it seems to be agreed, that societies or communities of individuals, having its cultivation for their principal object, are necessary, or at least proper, auxiliaries to its support and propagation."

Schwartz v. Duss 93 Fed. 529 decided by the Circuit Court for the

Western District of Pennsylvania, involved the Harmony Society, the same organization which appeared in Schriber v. Rapp,
330 supra, and in Baker v. Nachtrieb, 19 How. 126. In Schwartz v. Duss the court said on page 530 "In view of the decision of the supreme court of Pennsylvania in Schriber v. Rapp, 5 Watts, 350, and the decisions of the supreme court of the United States in Goesele v. Bimeler, 14 How. 589, and Baker v. Nachtrieb, 19 How. 126, it is clear that the above-recited articles of agreement are valid contracts, and that thereunder, upon the death of a member of the society in fellowship, no claim, enforceable against the society or its property, passes to his heirs or personal representatives, and that since 1836 no member voluntarily withdrawing from the society could acquire any such claim."

And speaking of persons who continued in the society until their death, as did Wirth in this case, the court also said on the same page: "The other persons through whom the plaintiffs claimed remained with the society and died in fellowship. They thus received and enjoyed all the benefits secured to them by the recited articles of agreement, and therefore no rights, enforceable against the society, passed from them to their heirs or personal representatives."

The decree in that case was affirmed by the circuit court of appeals of the third circuit, 103 Fed. 567, and by the supreme court in 187 U. S. 8. The supreme court in affirming the judgment, said on page 26.

"That agreement was the affirmation and the continuation of the prior agreements, and they were held not to be offensive to the public policy of Pennsylvania, by the Supreme Court of that State in Schriber v. Rap, 5 Watts, 351. The trial court in that case had instructed the jury that "there is nothing in the articles of association (those of 1805, 1821 and 1826) given in evidence that renders the agreement unlawful or void; nothing in them inconsistent with constitutional rights, moral precepts, or public policy." The Supreme Court observed that the point made against the articles as being against public policy was attended with no difficulty, and Chief Justice Gibson said for the court: "An association for the purpose expressed is prohibited neither by statute nor the common law." And it did not occur to this court in Baker et al. v. Nachtrieb, 19 How. 126, to treat them as invalid contracts. See also Goesele v. Bimeler et al., 14 How. 589; Speidel v. Henrici, 120 U. S. 377."

Some of the questions here involved were before the circuit court of the Southern District of New York, where a demurrer to a bill very similar to the bill in this case was overruled. Benziger v. Steinhauser, 154 Fed. 151.

331 No one of the cases cited by the defendant shows that the contract evidenced by the complainant's charter, constitution and by-laws is contrary to public policy. The one that comes nearest to it is Baltimore Humane Society v. Pierce 100 Md. 520. It was there held that the contract by which Pierce agreed on entering a Home for Aged Men to convey to the society all property which he might thereafter acquire by device or legacy, was void against public policy.

Without passing upon the soundness of this decision, it is enough to say that it furnishes no support for the proposition that after Pierce's death his executor could have recovered from the Home the value of the services which Pierce might have rendered to it in consideration for his support during his life.

I conclude that the contract here involved was not void as being against public policy, or for any other reason, and that it was binding on Wirth at his death, and upon his heirs now, unless it was in some way modified in his life time. The claim of the defendant is that there was such modification.

Father Wirth was an author of some repute, and for a long time prior to his death published many of his works. He made a contract in 1897 with Benziger Bros. publishers, by which they agreed to publish his books and pay him a royalty thereon. Father Wirth procured in his own name copyrights on some of these books. It is proven beyond doubt that not only the money paid to Father Wirth by Benziger Bros. but also all which he received from the sale of his books, he kept and used during the latter years of his life, turning none of it over to St. Mary's Abbey. It is also proven that while the Abbot required Father Wirth to account for moneys which he received for his services in the different churches with which he was connected, the Abbot never required him to account for any of the money which he received from the sale of his books. It is also proven that the Abbot of St. Mary's knew of the contract between Benziger Bros. and Father Wirth, and knew also that before that time Father Wirth had received and was receiving money from the books which he published. The testimony also shows, both that of the complainant and that of the defendant, that Wirth was given permission by the Order to use the money which he received from his books. There is some controversy in the evidence, however, as to the precise terms of that permission. That it was oral is proven. The testimony of the complainant is that the permission was simply that Father Wirth might himself dispose of the money for charitable purposes, instead of turning it over to the Abbey. Of the witnesses for the defendant upon this point, only two need be considered, Rose Schneider and Elizabeth Wirth. The testimony of Florian
332 Wirth, the husband of Elizabeth Wirth, one of the heirs, upon this point is not entitled to any weight, for although he said in several places that Father Wirth told him that he had permission to use the money derived from his books for any purpose he saw fit, yet he said at two different places that Father Wirth never said anything to him about the disposition which should be made of this money. Rose Schneider testified that Father Wirth told her that whatever he earned with his pen was his own, and that he had received permission from the Abbot. Elizabeth Wirth testified that Father Wirth told her that he had permission from the Abbot to write books, and that he could do with the money what he liked. I find, however, as a fact, that the permission was to use the money only for charitable purposes. The evidence does not justify a finding that there was a permission that the money which he received from the sale of his books should belong to him as an individual.

Such a permission would be entirely inconsistent with the vow of poverty, the fundamental idea of the Order, and it would be beyond the power of the Abbot to give. There is nothing in the charter, constitution or by-laws, which authorizes the Abbot to single out one of the monks and say to him that all or a part of what he earned might belong to himself. The effect of the permission that was given was to make Wirth the agent of the Order in disposing of the money in charity, which agency terminated with his death. Whatever he had thus disposed of the complainant would be estopped from recovering now But the permission falls far short of an agreement that whatever he left should after his death belong to the heirs and not to the Order. The permission being as thus stated, namely, to use the money for charitable purposes, the argument of the defendant based upon the practical construction of the contract by the parties, laches and estoppel, loses its force.

While it is proven that the Abbot knew that Wirth was receiving the money, and that he had invested it in his own name, yet there is nothing to show that he ever knew that Wirth claimed it as his own so that it would go to his heirs at his death. It is very apparent that Father Wirth was treated with a great deal of consideration by the Abbot and other members of the Order. The explanation of this is found in his age, the state of his health, his ability and the distinguished services which he had rendered to the Order.

From what has been said it appears that the contract was valid and that as made originally it continued until Wirth's death. By it all that he acquired during his lifetime became the property of the Order. Even that which he paid out he paid out, not as his own, but as the money of the Order. When he died every-
333 thing that he left belonged to the Order, and though the title to it stood in his name, that fact did not make it the property of his heirs. It was the property of the Order, and a court of equity could compel the heirs and administrator to account therefor.

Some objections to granting the complainant any relief are made by the defendant based upon the statute of limitations and the probate law of Minnesota. One of these objections is that the complainant never presented its claim to the Probate Court. Sec. 3730, Rev. Laws of Minn. 1905, provides in part, as follows:

"All claims against the estate of a decedent arising upon contract whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred." That the claim of the Order was not a provable claim under this section is very clear. It does not claim damages for breach of a contract, but claims the property itself. It claims, for example, to be the equitable owner of the real estate situated in Minneapolis, and of the copyrights, and of the notes now in the possession of the administrator. The claim of a third person that he is the owner of property in the hands of an administrator is not a claim that is within the jurisdiction of the Probate Courts of Minnesota. Mousseau v. Mousseau 40 Minn. 238. The case of Jorgensen v. Larson, 85 Minn. 134, cited by the defendant was not

an action for specific performance, but was a claim for damages. The plaintiff in that case by virtue of his executory contract signed only by the husband, was never the owner, legal or equitable of the wife's one-third interest in the property. As the claim in this case was not a provable one it is not necessary to consider the case of Security Trust Company v. Black River National Bank, 187 U. S. 211, cited by the defendant, nor his argument based thereon, to the effect that the laws of Minnesota relating to proof of claims are binding upon the National courts sitting therein.

The defendant also relies upon Section 3733 of the Revised Laws of Minnesota. That Section is as follows:

"No action at law shall lie against an executor or administrator for the recovery of money upon and demand against the decedent allowable by the probate court, and no claim against a decedent shall be a charge upon his estate unless presented to the probate court for allowance within five years after his death: Provided, that nothing in this section shall be construed as preventing an action to enforce a lien existing at the date of decedent's
334 death, nor as affecting the rights of a creditor to recover from the next of kin, legatees, or devisees to the extent of assets received."

The claim here in question not being a provable claim, the first part of the section does not apply, nor does the last part of the section apply for the same reason. That part is not, as the defendant claims, entirely without limitation. It is qualified by the nature of the claim, for its assumes that it is a claim which may be allowed by the Probate Court. The section itself on its face, as well as its history shows too that it contemplates a lien upon the estate by virtue of proceedings in the Probate Court, and not in courts of general jurisdiction.

The defendant also claims that the suit is barred by the general statutes of limitation of Minnesota. (Section 4076 Revised Laws of Minnesota.) The limitation is one of six years. Wirth died December 16, 1901. The bill was filed on August 19, 1907, and therefore within six years from his death.

As has been before said, the relations between Wirth and the Order were such that all he acquired belonged to the Order. As agent of the Order, he had a right to dispose of for charitable purposes the money which he derived from his books, but the part of his money which at the time of his death he had not disposed of then was, as it always had been, the property of the Order. No cause of action therefore arose against Wirth during his life as to that property which he had not disposed of. This suit was commenced within six years after his death, when for the first time any cause of action as to the property so remaining arose. Section 4085 Revised Laws of Minnesota has no bearing upon this case. It was intended by this section to lengthen, not to shorten the limitation provided for in the general law. Wilkinson v. Winne 15 Minn. 159, 160.

The defendant finally says that there is a want of equity in the bill, and discusses it from the standpoint of a bill for specific performance, which in fact complainant himself calls it. It is of

little importance what name is given to a suit. If it appears that the complainant is entitled to equitable relief, that relief should be given to it, regardless of the name that is given to the bill. The facts show that the complainant at the death of Wirth was the owner of all the property left by him. It was the legal owner of all the title to which did not stand in Wirth, and as to that which Wirth had in his name it was the equitable owner. The suit seems to be one to enforce the equitable ownership rather than one to compel specific performance.

335 A decree will be entered dismissing the cross-bill. As to the property not in the possession or under the control of the administrator a decree will be entered substantially as prayed for in the bill. As to the property which is in the possession of the administrator other questions arise. Such property being in the possession of the administrator is in the possession of the Probate Court of Minnesota, and this Court cannot interfere with the possession of that Court. See cases cited in Pulver v. Leonard, 176 Fed. 586-9, Waterman v. Canal-Louisiana Bank Co., 215 U. S. 23. In the case last cited it was said on page 46:

"The United States Circuit Court, by granting this relief, need no interfere with the ordinary settlement of the estate, the payment of the debts and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the probate court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case of Payne v. Hook, 7 Wall. 425, and Ingersoll v. Coram, 211 U. S. 335, supra.

It is to be presumed that the probate court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal Court. It has been frequently held in this court that a judgment of a Federal Court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court."

A decree will therefore be entered declaring that the Order of St. Benedict of New Jersey is the sole owner of the amount of the residue of the property, as determined by the administration in the probate court, in the hands of the administrator, and declaring that such residue be held in trust for the complainant.

336 The decree will also provide that when such residue is discharged from all claims of administration and is ready for distribution to the persons thereto legally entitled, the administrator pay it to the complainant.

The decree will also enjoin the administrator from paying such residue to any of the heirs, or to any person other than the complainant.

Costs will be allowed to the complainant.

Dated this 22nd day of June, 1910.

CHARLES A. WILLARD, *Judge.*

Endorsed: Decision, Ordering Decree for Complainant with Costs. Filed July 5, 1910. Henry D. Lang, Clerk.

In the Circuit Court of the United States, District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,

vs.

ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels, and Credits of Augustin Wirth, Deceased, Defendant.

This cause having come on to be heard on the bill of complaint, answer and cross-bill of defendant, the replication of complainant and its answer to defendant's cross-bill and defendant's replication to complainant's answer to the cross-bill of the defendant, and the proofs, documentary and written, taken and filed in said cause, and having been argued by counsel for the respective parties;

And the Court having made its decision, dated the 22nd day of June, 1910 and filed in said action, ordering that a decree be entered herein dismissing the cross-bill and granting substantially the relief prayed for in complainant's bill;

Now Therefore: It Is Hereby Ordered, Adjudged and Decreed as follows, viz:

That the cross-bill of the defendant herein be dismissed;

That the complainant is the owner of all the property left by Augustin Wirth at the time of his death;

That the payments made by the firm of Benziger Brothers of New York referred to in the bill of complaint herein, to the Order of St. Benedict of New Jersey are valid payments; that the said Order was entitled to the money so paid and not the administrator of the estate of Augustin Wirth, Deceased; and said Order is further entitled to the moneys now in the hands of said

337 Benziger Brothers arising from the sales of the copyrightel books mentioned in the bill herein, and to hereafter come into their hands and not the administrator of the estate of said Augustin Wirth, deceased.

It is further Ordered Adjudged and Decreed: That the Order of St. Benedict of New Jersey is the sole owner of the amount of the residue of the said property as determined by the administration of

the probate court of Brown County, Minnesota, in the hands of said administrator and that the said Albert Steinhauser, individually and as such administrator hold such residue in trust for complainant, and when such residue is discharged from all claims of administration and is ready for distribution to the persons legally entitled thereto, said Albert Steinhauser pay the same to the complainant; and the said Albert Steinhauser is hereby enjoined from paying such residue or any part thereof to any of the heirs of said Augustin Wirth, deceased, or to any person other than the complainant.

It is further Ordered Adjudged and Decreed: That the administrator pay over, transfer, assign and convey to complainant all of the property making up said residue, whether real, personal or mixed, by proper acts and instruments of assignment and deeds of conveyance, and that if the administrator fails to execute and deliver proper papers of transfer, this decree shall be of the same force and effect as such transfer or assignment, and further ordered that a certified copy of this decree be delivered to the Judge of Probate of Brown County, Minnesota, and that the same be due notice of this proceeding to the said probate court.

That the copyrights among others above referred to are the copyrights of the following books: "Hunolt Sermons," "New May Devotions," "The Confessional," "Eight Short Practical Sermons on Mixed Marriages," "New and Old Sermons," "The Seven Last Words on the Cross," "Two Retreats for Sisters," "Thoughts and Counsels for the Consideration of Young Men," "Lenten Sermons," "Funeral Sermons," "The Two Edged Sword," and "The Sacrament of Penance."

It is further Ordered That said complainant may apply at any time to this Court for a further order or direction at the foot of this decree for such additional relief as it may be entitled to herein, and for such further order as may be necessary to make this judgment effectual.

338 It is further Ordered Adjudged and Decreed: That the complainant recover from the defendant its costs herein, to be taxed by the Clerk of this Court.

Dated this 27th day of September, 1910.

CHARLES A. WILLARD, *Judge.*

Endorsed: Final Decree. Filed October 25th, 1910. Henry D. Lang, Clerk.

In the Circuit Court of the United States, District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
vs.
ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Defendant.

Clerk's fees, fees in case	$22.40	
Clerk's final record	71.40	
		$93.80
Marshal's fees, on writ		10.06
Attorney's fees:		
Docket fee, 20.00. Deposition	5.00	25.00
Total		$128.86

The above bill of costs and disbursements taxed and allowed at $128.86.

Dated this 25th day of Oct., 1910.

HENRY D. LANG, *Clerk.*
By MAMIE A. CARLSON, *Deputy.*

STATE OF MINNESOTA,
County of Ramsey, ss:

Otto Kueffner being first duly sworn on oath deposes and says: that he is one of the attorneys for the complainant in the above entitled cause; that the above bill and items of costs and disbursements therein are just and correct, and have been necessarily incurred therein.

OTTO KUEFFNER.

Subscribed and sworn to before me this 28th day of September, 1910.

[NOTARIAL SEAL.] HENRY MARKS,
Notary Public, Ramsey County, Minn.

My commission expires Sept. 14, 1911.

339 SIR: Please take notice that the costs and disbursements of the complainant in the foregoing entitled action will be taxed by and before Miss Mamie Carlson, Clerk of the above named Court, at her office in the United States Post Office Building in the City of Mankato, Minnesota, on Wednesday, the 5th day of October, 1910, at 10 o'clock in the forenoon of said date, and that the foregoing is a statement of the items of costs and disbursements that will then and there be claimed on behalf of said complaint and

inserted in the judgment in said action that will then and there be entered.

Very respectfully,

OTTO KUEFFNER,
Attorney for Complainant.

To Messrs. Pitzer & Hayward, Attorneys for Defendant.

Due service of above notice acknowledged, and copy received at Nebraska City, Nebraska, this 29th day of September, 1910.

PITZER & HAYWARD,
Solicitors for Defendant and Cross-complainant.

Endorsed: Notice of Taxation of Costs. Due and personal service of the within Notice by copy is hereby admitted this — day of Sept., 1910, at Nebraska City, Nebraska. Pitzer & Hayward, Defendant's Attorneys. Filed Oct. 4, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the United States Circuit Court, District of Minnesota, Second Division.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,

vs.

ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Defendant.

In accordance with the Decree of this Court this day made and entered herein, it is by the Court Ordered, Adjudged and Decreed that the Order of St. Benedict of New Jersey the Complainant herein do have and recover of and from the defendant Albert Steinhauser, individually and as administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, its costs and disbursements in this action this day [taxes] and allowed at the sum of One Hundred twenty-eight and 86/100 Dollars ($128.86), and that it have execution therefor.

Dated October 25, 1910.

CHARLES A. WILLARD, *Judge.*

340 Endorsed: Judgment for Costs. Filed Oct. 25, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
vs.
ALBERT STEINHAUSER, Administrator of the Goods, Chattels, Rights, and Credits of Augustin Wirth, Deceased, Defendant.

Assignment of Errors on Appeal.

Comes now the defendant and cross-complainant in the above cause, Albert Steinhauser, as administrator of the goods, chattels, rights and credits of Augustin Wirth, deceased, and files the following assignment of errors upon which he will rely upon his appeal from the decree made by this Honorable Court on the 25th day of October, 1910, in the above entitled cause; and respectfully submits that there was error in the findings, ruling, decision and decree of the trial Court, as follows:

I.

In the admission and consideration over objections as to competency, of testimony adduced on behalf of the complainant given by the witness Peter Engle (and other witnesses) in substance and to the effect that the Vow of Poverty, and the entering into membership by Augustin Wirth, deceased, of the complainant, incapacitated the said Augustin Wirth as a member of said Order from himself owning or holding property.

II.

In holding and deciding to be incompetent (if so in fact held and considered) testimony offered on behalf of the defendant and cross complainant, of Elizabeth Wirth (and other witnesses) to statements of declarations made by Augustin Wirth in his lifetime, in substance and to the effect that the complainant neither made nor held any claim upon the property of his estate derived from his literary work.

III.

In holding and deciding that the membership contract as evidenced by the documents in the record and alleged in the Bill of Camplaint, constituted a valid enforcible contract and agreement at the suit of the complainant against the defendant and cross-complainant as administrator of the estate of Augustin Wirth, deceased.

341

IV.

In holding and deciding that the payments made by Benziger Brothers referred to in the Bill of Complaint, to the Order of St.

Benedict of New Jersey, are valid payments; and that the said Order of St. Benedict was entitled to the money so paid.

V.

In holding and deciding that the said Order of St. Benedict, the complainant, is further entitled to the moneys now in the hands of the said Benziger Brothers arising from the sales of the copyrighted books mentioned in the Bill herein, and to hereafter come into their hands.

VI.

In holding and deciding, and adjudging that the Order of St. Benedict, the complainant, is the sole owner of the residue of the estate property as determined by the administration of the Probate Court of Brown County, Minnesota, and to all of the property involved in this action.

VII.

In holding and deciding that the claim of the complainant, the order of St. Benedict of New Jersey, as set out and alleged in its bill of complaint, and as shown by the evidence, was not barred by the statutes of the State of Minnesota as set out in the answer of the defendant, Albert Steinhauser, and also as set out in the [cost] bill of the said defendant against the said complainant, being the general statutes of limitation of the State of Minnesota, and further statutes in respect to the time of commencing actions and asserting claims against the estates of deceased persons, or against an executor or administrator of the estate of a deceased person in the State of Minnesota.

VIII.

In adjudging and decreeing dismissal of the cross-bill of this defendant against the said complainant, The Order of St. Benedict of New Jersey.

IX.

In entering a final decree therein in favor of the said The Order of St. Benedict of New Jersey, and against this defendant in accordance with the said holding, findings and decision, and in not making and entering a final decree in favor of this defendant, and cross-complainant, and against the complainant The Order of St.
342 Benedict of New Jersey, adjudging and deciding the ownership of the said estate property to be in this defendant and cross-complainant, for the use and benefit and for distribution to the heirs at law of the said Augustin Wirth, deceased.

PITZER & HAYWARD,
Nebraska City, Nebraska,
Solicitors for Albert Steinhauser, Administrator, etc., Defendant and Cross-Complainant.

Endorsed: Assignment of Errors on Appeal. Filed Oct. 25th, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
v.
ALBERT STEINHAUSER, Administrator of the Goods, Chattels, Rights and Credits of Augustin Wirth, Deceased, Defendant.

Petition for Order Allowing Appeal.

To the Honorable Charles A. Willard, District Judge and one of the Judges of the above named Court, presiding therein:

The above named defendant, who is also cross-complainant in the above entitled cause, Albert Steinhauser, as administrator of the goods, chattels, rights and credits of the estate of Augustin Wirth, deceased, conceiving himself aggrieved by the order and decree made and entered in and by the above named Court in the above entitled cause under the date of October 25, 1910, wherein and whereby and among other things it was and is ordered, adjudged and decreed that the Order of St. Benedict of New Jersey is the sole owner of the amount of residue of the property of the estate of the said Augustin Wirth, deceased, as such residue is determined by the administration of the Probate Court of Brown County, Minnesota, in the hands of the said administrator; and that he, the said Albert Steinhauser, individually, and as such administrator, holds such residue in trust for the said The Order of St. Benedict of New Jersey, the said complainant, for distribution to said complainant upon its discharge from administration claims; and enjoining the said Albert Steinhauser from paying such residue or any part thereof to any of the heirs of said Augustin Wirth, deceased, or to any person other than the complainant; and that the said Albert Steinhauser as such administrator pay over, transfer and deliver by conveyances
343 and assignments all of such estate property and including the copyrights of various published books in said decree mentioned; and adjudging costs in favor of the said complainant for the reasons set forth in the assignment of errors which is filed herewith; and he prays that this, his petition for his said appeal, may be allowed, and that a transcript of the record, proceedings, and papers upon which said order, judgment and decree was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, for the Reversal of said Decree for the errors complained of.

Dated October 25th, 1910.

PITZER & HAYWARD,
Solicitors for Albert Steinhauser, Administrator, etc., Defendant and Cross-complainant.

Endorsed: In Equity. Petition for Order Allowing Appeal and Prayer for Reversal. Filed Oct. 25, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

In Equity.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,

vs.

ALBERT STEINHAUSER, Administrator of the Goods, Chattels, Rights and Credits of Augustin Wirth, Deceased, Defendant.

Order Allowing Appeal.

On motion of W. H. Fitzer, Esq., solicitor and of counsel for the defendant and cross-complainant, Albert Steinhauser, and upon consideration of the petition of the said defendant and cross-complainant filed herein for an order allowing appeal, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore filed and entered herein for the Reversal of said Decree for the error complained of be and the same hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings herein, or of such parts thereof as under the rules of said Circuit Court of Appeals may be designated by the parties as material and sufficient for the review of said judgment as in equity, be forthwith transmitted to the United States Circuit Court of Appeals.

It is further ordered that the bond on appeal be fixed at the sum of Two Thousand Dollars ($2,000.00) [Dollars], the
344 same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated October 25, 1910.

CHARLES A. WILLARD,
District Judge.

Endorsed: In Equity. Order Allowing Appeal. Filed Oct. 25th, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

American Surety Company of New York.
Capital and Surplus, $5,500,000.

Know All Men By These Presents: That we, Albert Steinhauser, as administrator of the goods, chattels, rights and credits of Augustine Wirth, deceased, of the City of New Ulm, in Brown County, State of Minnesota, as principal, and American Surety Company of New York as surety, are held and firmly bound unto The Order of St. Benedict of New Jersey, in the full and just sum of Two Thousand Dollars ($2,000.00), to be paid to the said The Order of St.

Benedict of New Jersey, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals, and dated this 25th day of October, in the year of Our Lord One Thousand Nine Hundred and Ten.

Whereas, lately at the October Term of the United States Circuit Court, for the District of Minnesota, Second Division, in a suit pending in said court between The Order of St. Benedict of New Jersey, as the complainant, and Albert Steinhauser, as administrator of the goods, chattels, rights and credits of Augustine Wirth, deceased, as defendant, a judgment and decree was rendered against the said defendant and in favor of said complainant, and the said defendant has obtained an order allowing an appeal to reverse the said judgment and decree in the aforesaid suit, and a citation directed to the said complainant citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit, in the City of St. Louis, sixty (60) days from and after the date of said citation.

Now, the Condition of the Obligation is such, that if the said Albert Steinhauser, as administrator of the goods, chattels, rights and credits of Augustine Wirth, deceased, shall prosecute said appeal to effect, and answer all damages and costs if he fail to
345 make good his plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] ALBERT STEINHAUSER,
Administrator of Estate of Augustine Wirth.
AMERICAN SURETY CO. OF NEW YORK,
By E. M. ZUEL, *Res. Vice-President.*

Attest:
A. R. PFAU, *Res. Ass't Secretary.*

Sealed and Delivered in Presence of—
N. HENNINGSEN.
ADOLPH MEICE.
CLARA CARLSON.
LOUISE RAINERSON.

[CORPORATE SEAL.]

STATE OF MINNESOTA,
County of Brown, ss:

On the 28th day of October, 1910, before me personally appeared Albert Steinhauser to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL.] N. HENNINGSEN,
Notary Public, Brown County, Minn.

My commission expires Oct. 15, 1915.

STATE OF MINNESOTA,
County of Blue Earth, ss:

On the 29th day of October, 1910, before me appeared E. M. Zuel and A. R. Pfau, Jr., to me personally known who being by me duly sworn did say that they are the Res. Vice-President and the Res. Ass't Secretary — the corporation described in and which executed the above instrument; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and said E. M. Zuel and A. R. Pfau, Jr., acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] LOUISE RAINERSON,
Notary Public, Blue Earth County.

My commission expires April 14, 1917.

346 Approved October 31st, 1910.
CHARLES A. WILLARD, *Judge.*

Endorsed: Supersedeas Bond and Approval. Filed Nov. 1, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

Citation.

UNITED STATES OF AMERICA,
Circuit Court, Eighth Circuit:

United States of America to The Order of St. Benedict of New Jersey, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal filed in the Clerk's Office of the said court at Mankato wherein Albert Steinhauser, as administrator, etc., of Augustin Wirth, deceased, is defendant, and you are Complainant to show cause, if any there be, why the Judgment and Decree rendered against the said Albert Steinhauser, as administrator as aforesaid, as in said decree mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Charles A. Willard, Judge of said Court this 25th day of October A. D. 1910.

CHARLES A. WILLARD,
Judge of said Court.

Due service of the foregoing Citation by Copy at St. Paul, Minnesota is hereby admitted this 27 day of October, 1910.

OTTO KUEFFNER &
ALBERT SCHALLER,
Sols. for Compl'nt.

No. 177. United States Circuit Court, District of Minnesota, 2nd Division. The Order of St. Benedict of New Jersey vs. Albert Steinhauser, etc., Defendant. Citation. Filed this 1st day of November, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

In the Circuit Court of the United States for the District of Minnesota, Second Division.

347 THE ORDER OF ST. BENEDICT OF NEW JERSEY, Complainant,
vs.
ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Defendant.

Original Bill.

ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Complainant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY, Defendant.

Cross-Bill.

Præcipe for Record on Appeal.

Albert Steinhauser as Administrator of the goods, chattels and credits of Augustin Wirth, deceased, defendant to the original Bill of The Order of St. Benedict of New Jersey, complainant, and cross-complainant herein against the said complainant, and the appellant, comes now and files this his præcipe for the completion and certification of the record in this cause upon appeal herein allowed; and prays that such record shall comprise the following:

1. The complete style and title of this Court and cause.
2. The Bill of Complaint of The Order of St. Benedict of New Jersey, and all Exhibits comprised therein.
3. The demurrer of the defendant to the Bill of complaint.
4. The order overruling defendant's demurrer to the Bill of Complaint.
5. The answer of the defendant to the Bill of Complaint.
6. The replication of the complainant to the answer of defendant.
7. The Cross-Bill of the defendant, Albert Steinhauser, against the complainant, The Order of St. Benedict of New Jersey.
8. The answer of the complainant, The Order of St. Benedict of New Jersey to the cross-bill of the defendant, Albert Steinhauser as administrator.
9. The replication of the defendant Albert Steinhauser as administrator to the answer of the complainant to defendant's Cross-Bill.
10. The testimony, Exhibits and stipulations on behalf of the complainant comprised in complainant's record in this cause pp. 85 to 289 inclusive.

11. The testimony, Exhibits and stipulations on behalf of the defendant and comprised in defendant's record in this cause pp. 79 to 326 inclusive.
12. The opinion of the Court filed herein.
13. The decree entered of record herein.
14. The petition of the defendant for allowance of appeal.
15. The assignment of errors on behalf of the defendant.
348 16. Appeal or supersedeas bond given and filed by the defendant, and approval thereof.
17. Order allowing appeal.
18. Citation to the complainant and acknowledgment of service.
19. The Clerk's certificate to the transcript of the foregoing.

ALBERT STEINHAUSER,
As Administrator, etc., Appellant,
By PITZER & HAYWARD,
Of Nebraska City, Nebraska, Solicitors.

Endorsed: Præcipe for Record on Appeal. Filed Nov. 21, 1910. Henry D. Lang, Clerk. By Mamie A. Carlson, Deputy.

UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Second Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 511 pages, numbered consecutively from 1 to 511 inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, Final Decree and all other proceedings in said cause, except those not named in Appellant's Præcipe for Record on Appeal, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at Mankato, in the District of Minnesota, this 29th day of November A. D. 1910.

[Seal U. S. Circuit Court, Second Division, Dist. of Minnesota.]

HENRY D. LANG, *Clerk,*
By MAMIE A. CARLSON, *Deputy.*

Filed Dec. 21, 1910. John D. Jordan, Clerk.

349 (*Appearance of Counsel for Appellant.*)

On the twenty-first day of December, A. D. 1910, the appearance of counsel for appellant was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3520.

ALBERT STEINHAUSER, as Administrator, etc., of Augustin Wirth, Deceased, Appellant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY.

The Clerk will enter my appearance as Counsel for the Appellant.

WM. H. PITZER,
WM. HAYWARD,
Nebraska City, Nebraska.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3520. Albert Steinhauser, as administrator, etc., Appellant, vs. The Order of St. Benedict of New Jersey. Appearance. Filed Dec. 21, 1910, John D. Jordan, Clerk. Wm. H. Pitzer, Wm. Hayward, Counsel for Appellant.

(*Appearance of Mr. Otto Kueffner as Counsel for Appellee.*)

And on the tenth day of March, A. D. 1911, the appearance of Mr. Otto Kueffner, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3520.

ALBERT STEINHAUSER, as Administrator, etc., Appellant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY.

350 The Clerk will enter my appearance as Counsel for the Appellee.

OTTO KUEFFNER.

314 & 15 New York Life B'ld'g, St. Paul, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3520. Albert Steinhauser, as Administrator, etc., Appellant, vs. The Order of St. Benedict of New Jersey. Appearance. Filed Mar. 10, 1911, John D. Jordan, Clerk. Otto Kueffner, Counsel for Appellee.

(*Appearance of Mr. Albert Schaller as Counsel for Appellee.*)

And on the tenth day of March, A. D. 1911, the appearance of Mr. Albert Schaller, as counsel for the appellee, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3520.

ALBERT STEINHAUSER, Individually and as Administrator, etc., Appellant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY.

The Clerk will enter my appearance as Counsel for the Appellee.
ALBERT SCHALLER.

314-315 New York Life B'ld'g, St. Paul, Minn.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3520. Albert Steinhauser, individually and as Adm'r, Appellant, vs. The Order of St. Benedict of New Jersey. Appearance. Filed Mar. 10, 1911, John D. Jordan, Clerk. Albert Schaller, Counsel for Appellee.

(*Order of Submission.*)

And on the tenth day of May, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

351 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1911, Wednesday, May 10, 1911.

No. 3520.

ALBERT STEINHAUSER, as Administrator, etc., Appellant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause having been called for hearing in its regular order, argument was commenced by Mr. William H. Pitzer for appellant, continued by Mr. Otto Kueffner for appellee and concluded by Mr. William Hayward for appellant.

Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the fourth day of March, A. D. 1912, the opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

352 United States Circuit Court of Appeals, Eighth Circuit.

No. 3520.—December Term, A. D. 1911.

ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Appellant,

vs.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a Corporation, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. William H. Pitzer and Mr. William Hayward, for appellant.
Mr. Otto Kueffner (Mr. Albert Schaller and Messrs. Arnold & Greene on the brief), for appellee.

Before Adams and Smith, Circuit Judges, and Reed, District Judge.

REED, *District Judge,* delivered the opinion of the court.

The "Order of St. Benedict" an association of religious men living in monastic life and incorporated under the laws of New Jersey, which will be called the complainant, brought this suit in the Circuit Court against Albert Steinhauser, as administrator of the goods and chattels of Augustin Wirth, deceased, a member of the Benedictine Order of Monks, and alleged to be a member of the complainant Order, to establish an equitable title to certain personal property under an alleged agreement made by the deceased in his lifetime, whereby he agreed to account for and pay over to the complainant all of his future earnings, and transfer to it all property of every kind that he might thereafter acquire (of which the property in controversy is a part) in consideration of the care and maintenance that the Order agreed to render, and which it is alleged it did render the deceased during his lifetime.

The defendant answered admitting that he was the administrator of Wirth's estate, but denied the contract or agreement al-
353 leged to have been made by Wirth, its validity if made, and pleaded the statute of limitations of Minnesota, and some other defenses in bar of this suit; and by cross bill alleged that complainant, after the death of Wirth, wrongfully took possession of certain securities, the property of Wirth and in his possession and under his control at the time of his death, removed the same from

the state of Minnesota where Wirth then resided, and converted the same to its own use; and prayed that his right and title to said property be established and complainant required to return the same or account to him, as administrator of Wirth's estate for its value. Upon the final hearing the Circuit Court granted the prayer of the bill, and dismissed the cross bill. (179 Fed. 137.) The defendant appeals.

The agreement relied upon by complainant as having been made by Wirth consists of certain vows alleged to have been taken by him upon joining a Benedictine Order of Monks at St. Vincent's Mission in Pennsylvania, and what is known in the Roman Catholic Church as the "Rule of St. Benedict" and its own charter, and the constitution of its Society founded upon that Rule. The "Rule" it is claimed was originally devised by St. Benedict of Nursia, in the latter part of the fifth or early in the sixth century A. D., at Subiaco, or Monte Casino, Italy, for the guidance and government of an association of religious men then living in Monastic life near Subiaco, who selected him as the head or superior of an Order, which still bears his name, the "Order of St. Benedict." Of this Association or Order there is no evidence in the record, save as may be gathered from the history thereof; and it is probable that none is now obtainable from any other source. For summaries of the history of the Order and of Monachism generally, its rise and spread over Western Europe, its decline in the Reformation era and later; its suppression by many of the European states in the middle ages and later; and its present status in Europe and the United States, see The Catholic Encyclopedia (Robert Appleton, New York, 1907) Vol. II, articles "Benedict" and "Benedictine"; Encyclopedia Britannica (9th Ed.), Vol. III, article "St. Benedict"; and Vol. XVI, "Monachism," where synopses of the seventy-three chapters of the "Rule of St. Benedict" are given; and a Short History of Monks and Monasteries, by Wishart (1900). Aside from the history of the Order the ultimate facts shown by the testimony, so far as necessary to be considered are substantially as follows:

Augustin Wirth, a Bavarian by birth, came to this country prior to 1852, when about twenty-three years of age. In that year he was ordained a Roman Catholic Priest, and joined and became a member of a Benedictine Society, or Order of Monks established about 1846, at St. Vincent's Mission, West Moreland County, Pennsylvania, by Boniface Wimmers and others. The Society was later incorporated under the laws of Pennsylvania. Its charter, and the consti-
354 tution of the Society, are substantially the same as those of the complainant hereinafter set forth. At the time Rev. Wirth joined the St. Vincent Society he made and delivered to it vows in writing which read as follows:

"In the Name of Our Lord Jesus Christ, Amen!

I, Brother Augustin Wirth, a Bavarian of the diocese of Wuerzburg, to the honor of Almighty God, of the ever Blessed Virgin Mary, and our holy Father St. Benedict, and of all the Saints, by these present vows, promise stability and the conversion of my

morals, and obedience according to the Rule of the same Holy Father St. Benedict, in the presence of God and His Saints, whose relics are here present in the church, and also in the presence of the Right Reverend Father in Christ and Lord Boniface, the Superior of this Monastery of St. Vincent's, and of you Rev. Fathers and Brothers here present; in the name of the Father, and of the Son and of the Holy Ghost, Amen.

In Witness Whereof I have written with my own hand this present paper in this venerable place of St. Vincent, in the year one thousand eight hundred and fifty-two from the Incarnation of our Lord, on the feast of the Assumption of the Bl. Virgin Mary, the fifteenth day of August.

(SIGN OF THE CROSS.)"

Wirth remained a member of the St. Vincent Society until 1865, when he went to Atchison, Kansas, as Prior of the Monastery of the Benedictine Order at that place, and remained with that institution for some years. In May, 1887, he transferred his membership in the Order of St. Vincent to, and became a member of, the complainant Order, which was originally established at Newark, New Jersey, prior to 1868, and was incorporated in that year by a special act of the legislature of New Jersey, which act is as follows:

"An Act to Incorporate the Order of St. Benedict in New Jersey.

"SEC. 1. Be it enacted by the Senate and General Assembly of the State of New Jersey, that Boniface Wimmer (and others, naming them) and their associates, members of the Society called the Order of St. Benedict, being a society of religious men living in community and devoted to charitable works and the education of youth, be, and they are hereby, constituted a body politic and corporate by the name, style and title of the "Order of St. Benedict" of New Jersey, to have perpetual succession, to use a common seal, and alter and renew the same at pleasure, to take hold and enjoy lands, tenements and hereditaments, and to make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper; provided, that such by-laws shall not be repugnant to, nor inconsistent with the constitution of the
355 United States or of this State * * * and provided, that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof.

"SEC. 2. That the essential objects of said corporation shall be the education of youth and the establishment of churches and conducting service therein.

* * * * * * *

"Approved March 5, 1868."

The constitution of the Society, so far as necessary to be stated provides:

* * * * * * *

"SECTION II. The object of this Corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with the principles and the general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church.

"SECTION III. The officers of the Corporation shall consist of a President, First Vice-President, Second Vice-President, Treasurer and Secretary. The Rt. Rev. Abbot of St. Mary's Abbey, 528 High St., Newark, New Jersey, * * * shall be ex-officio President. * * * The President is also acting Treasurer; * * *

"SECTION IV. The President * * * shall have full power to make, execute, sign, seal and deliver all * * * writings whatsoever, necessary to the proper conduction, carrying on and transacting the temporalities of the Order," * * *.

* * * * * * *

"SECTION X. To become and to be a member of this Corporation it is absolutely necessary:

"1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St. Benedict in Italy, and well known in the Roman Catholic Church.

"2. To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church.

"SECTION XI. Membership is lost at once:

"1. By being dismissed according to the disciplinary Statutes of the Order of St. Benedict of New Jersey, approved of by Pope Pius IX for the American Cassines Congregation of Benedictines.

"2. By voluntarily leaving the Order for any purpose whatsoever.

"3. By joining any other order or secret society or any other religious denominations.

356 "SECTION XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

"It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Chapter of the Order of St. Benedict of New Jersey, and no further.

"And, moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible, to the legal title of the Order of St. Benedict of New Jersey. * * *"

An English translation of what purports to be Chapter 33 of the Rule of St. Benedict, which is observed as such by the St. Vincent and complainant Societies, was put in evidence by complainant and is as follows:

"The vice of personal ownership must above all things be cut off in the monastery by the very root, so that no one may presume to give or receive anything without the command of the Abbot; nor to have anything whatever as his own, neither a book, nor a writing tablet, nor a pen, nor anything else whatsoever; since monks are allowed to have neither their bodies nor their will in their own power. Everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for anyone to have anything which the Abbot did not give or permit him to have. Let all things be common to all, as it is written. And let no one call or take to himself anything as his own. But if anyone should be found to indulge this most baneful vice, and having been admonished once and again, doth not amend, let him be subjected to punishment."

In about 1897, Wirth, with permission of complainant's Abbot, became priest of a German Catholic Church Society at Springfield, Minnesota, and went there and remained in charge of that parish as priest until his death, December 22, 1901. He left a brother and a nephew and niece surviving him as his heirs at law; but left no debts, other than those of his last sickness. At the time of his death he had in his possession and under his control some $1,500 in money, and notes, mortgages, and other credits to the amount of some $5,000 or more, the legal title to all of which he then held. This property was acquired by Wirth in this way: while a member of the Society of St. Vincent he wrote a number of books upon religious subjects and translated others, which he copyrighted in his own name, and published and sold, the income from which he
357 received and retained as his own property with the permission of the Abbot of St. Vincent. When he came to the complainant Order in 1887, the Abbot of that Order, the Rt. Rev. Hilary Pfraengle, gave him permission to continue such literary work, receive the income therefrom and retain the same in his own right as he had previously been allowed to do at St. Vincent; and the money and other property that he had on hand at the time of his death are the proceeds arising from the sale of such books and the investment thereof in the mortgages and securities before mentioned, none of which property had ever been transferred to the complainant or to any other Benedictine Order. After Father Wirth joined the complainant Society in 1887, the relations between him and its Abbot were not pleasant or satisfactory to either, and Wirth at times was desirous of leaving the monastery. They had many acrimonious disputes over matters pertaining to the Order; but none regarding the money received by Wirth as the income from his books, all of which was received by him with the knowledge of, and without objection from either Abbot. While Father Wirth was in New Jersey he served for several years as parish priest of religious congregations in the vicinity of complainant's mon-

astery, with permission of its Abbot; and also at other places. He also remained away from the monastery much of the time without his permission, at one time going abroad and visiting Rome, at his own expense; and whenever absent from the monastery he received no support from complainant. After going to Springfield he never returned to the complainant Order, never received any support from it, and never accounted to it for the income from his books, and was never requested to do so until in June, 1899, when Hildebrand, Abbot Primate, resident in Rome, of the Benedictine Orders who met Wirth when he was in Rome, directed him by letter to write Abbot Pfraengle and apologize to him for his conduct, account to him for any moneys that he had not accounted for, and to obey his orders in the future. Hildebrand also wrote Abbot Pfraengle in February preceding, to impose upon Wirth suitable penance, and require of him obedience in the future, and to account to him, Pfraengle, for all moneys that he had not accounted for. Wirth disregarded Hildebrand's letter, and so did Abbot Pfraengle the one to him. The latter testified that he did so because Hildebrand did not know of the permission that the Abbot of St. Vincent, and he as complainant's Abbot, had given Wirth to receive and retain the income from his books. Abbot Pfraengle also testified, however, that the permission given by him, and by the Abbot of St. Vincent to Wirth to have and use the income from his books was, that he might use the same for the benefit of the Orders only. Suffice it to say that the property involved in this suit is the income received by Father Wirth from his books, the investment thereof in the securities mentioned or other property, the right to the copyright of his publications after the expiration of his contract with the publishers thereof, and the credits due him for books sold prior and
358 subsequent to his death, none of which was ever conveyed or transferred by him to complainant, and all of which was taken possession of by complainant's Abbot after the death of Father Wirth without any legal proceedings authorizing him to do so; and complainant bases its right to the same upon the vows made by Wirth when he joined the Order of St. Benedict, Chap. 33 of the Rule of St. Benedict, and the transfer by Wirth of his membership to the complainant Order, and the charter and constitution of its Society.

It is admitted by the defendant in argument that Rev. Wirth became a member of the complainant Order in 1887; but whether or not he withdrew from that Order and severed his connection with it, as a matter of much doubt under the testimony. Certain it is that he never returned to, nor in any way affiliated with, the complainant Order or received any support from it, after he went to Springfield, unless the salary earned by him as Priest of the German Catholic Society at that place, and from which he supported himself, be deemed the property of the complainant. The decree of the Circuit Court, however, includes the finding as a fact, that Wirth did not withdraw from the complainant Order, but remained a member thereof until his death; and that finding is not so without support in the testimony as to warrant setting it aside. The case

will, therefore, be determined on the assumption that Wirth remained a member of the complainant Order until his death.

Witnesses in behalf of complainant, its Abbot and the Abbot of St. John's Abbey, a Benedictine Order at Collegeville, Minnesota, testified upon the hearing, that the vow of poverty, which they say is included in the vows of Father Wirth, when made in a religious order would, under the canon law, "incapacitate the member from ever after acquiring or possessing property for himself, and from making individual use of temporal things that can be valued in money"; and some contention is made in argument of counsel for appellee that this vow in connection with Chapter 33 of the "Rule of St. Benedict," should be so construed and enforced accordingly.

It is necessary to read into the vows of Father Wirth the "vow of poverty" so much relied upon by complainant, for it is not expressed in the vows as written by him. But admitting without deciding, that such testimony is competent to show the meaning and effect of the vows, in connection with the Rule of St. Benedict upon the right of Wirth to thereafter acquire and hold property in his own right under the canon law; that law is of no intrinsic authority outside the jurisdiction of its origin, or countries observing that system of law, except as it is sanctioned by statute or immemorial usage. 1 Bl. Com. 82-84. There is no question of church doctrine, or belief, or discipline involved in this controversy; nor is it a dispute between contending factions of a church or other society, as to which faction has conformed its practices and beliefs to the standards of the church, or society, and by reason thereof
359 claims the right to the control and use of its property; in which event the decisions of the tribunal created by the church or society for the determination of such questions, would be accepted by the civil courts as final. Watson v. Jones, 13 Wall. 679. The only question involved is that of the legal ownership of the specific property described in the bill, as between the complainant and the defendant, and that question is not to be determined by the canon, or church law, but by the law of the land. The canon law, however, or the law of the Church, of Rome, as between Father Wirth and the Church or the Benedictine Order, may have required of him during his lifetime strict adherence to his vows and observance of the Rule; but it cannot be seriously contended that either the vows or the Rule or both together, can have any effect whatever upon the legal right of Wirth to acquire and hold property in his own right.

The most that can rightly be claimed for these vows, in connection with the Rule is, that they are evidence of a contract of a civil nature between Wirth and the Order whereby he agreed to devote his time and labor thereafter, during the remainder of his life, to the exclusive benefit of the Society or Order, and to convey to it all property that he then owned or might thereafter acquire, in consideration of the agreement upon the part of the Order to suitably support and care for him in health and in sickness while a member of the Order; and complainant predicates its right of action against the defendant upon such a contract so made. That the

vows of Wirth and that portion of the Rule in evidence, are in effect a contract as between him and the Order is not seriously disputed by the defendant; but its validity is challenged by him as being inconsistent with the "fundamental principles of American institutions as expressed in their constitutions" or if it is held valid, then he contends that its true interpretation does not entitle the complainant to have the same enforced against the property in controversy.

Contracts of a similar nature where the service has been rendered, the property conveyed, and the support furnished pursuant thereto have been adjudged by controlling authority to be not in violation of constitutional guaranties, nor offensive to the public policy of the state where made. (Gentis et al. v. Bonnet, 14 How. 589; Speidel v. Henrici, 120 U. S. 377; Schwartz v. Duss, 187 U. S. 8; Burt v. Oneida Co., 156 New York, 342 (50 N. E. 967), and the several cases cited therein.

These suits were brought by members of the Separatist and Harmony Societies established in Ohio and Pennsylvania early in the last century, and the Oneida Community in New York, established in 1848, by members thereof respectively, after they had withdrawn from the Society, or by the heirs of a member after his death, for partition of the property of the Society, or to recover the value of property conveyed or services rendered to it before the with-
360 drawal or death of the member, except that in the Oneida case the suit was by one who had withdrawn from the Society to be reinstated therein. The contracts there involved had been fully performed by each of the parties, and it was held in each case that there could be no recovery. The facts in each case are so materially different from those in the case that the decisions have little or no bearing upon the questions here involved. This suit involves only the property acquired by Father Wirth after he joined the Society, the legal title and possession of which he retained until his death.

Although it is admitted in the brief of counsel for appellee that a member of the Order may voluntarily withdraw therefrom, as provided in Sec. XI of the constitution of the complainant Society, yet it was vigorously maintained by complainant's Abbot while a witness, that this meant by "secularization" only, and by that we understand him to mean some affirmative action on the part of the church. The Abbot says: "He (the member) is bound for life in his vows, and the only way to get out is by secularization, being secularized by transferring the vow of obedience to a bishop and being dispensed by living with permission outside of the monastery. * * * It is when a religious, a priest, by permission of the Pope, the Holy Father, the Head of the Church, is dispensed from his vows and also dispensed from the obligation of living in the monastery." By this the Rev. Abbot obviously means that under the law of the church the vows of a member of the Order are regarded as such that they can only be absolved therefrom by the affirmative action of the Holy Father as the Head of the Church, and unless He sees fit to give the requisite dispensation, the member is bound

for life in temporal, as well as in spiritual affairs. If such is the meaning of the vow: Is it, in connection with Chapter 33 of the Rule, enforceable in the civil courts, either at law or in equity? We think not. Chapter 33 provides: "The vice of personal ownership must above all things be cut off in the monastery by the very root; so that no one may presume to give or receive anything without command of the Abbot; since monks are allowed to have neither their bodies nor their will in their own power; everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for anyone to have anything which the Abbot does not give or permit him to have * * *." The vow in connection with this Rule, not only binds the member in physical and mental servitude to the Order for life, or until the Head of the Church shall see fit to absolve him from his obligations, but he also surrenders all control of his will to the Order. Such an agreement is no more enforceable, in the civil courts at least, than would be an agreement by one to surrender or forfeit to another his life. (See Clark's case, 1 Blackford, 122 (Ind.), 12 Am. Dec. 213 and note. In this country it is the inherent and natural right of every person to acquire and hold property in his own right;
361 and the state is interested in preserving the liberties as well as the lives of its members, and they are guaranteed against the deprivation thereof, either by the state or by any person, individual or corporate, without due process of law. If the agreement to perform the services is not enforceable, then upon what principle can it be enforced as an equitable title or right to the fruits of such services? We are of opinion that there is none. Complainant has cited to us no authority which sustains its contention, and upon a somewhat diligent search we have not been able to find any that does. Authorities are not wanting, however, if the vow and Rule together are treated as a contract and to mean what is claimed for it by complainant, that it is not enforceable as against after acquired property, either at law or in equity.

In Baltimore Humane Society v. Pierce, 100 Md. 520 (60 Atl. 277; 70 L. R. A. 485) Elisha Pierce had been admitted as an inmate of the Aged Men's Home of the Baltimore Humane Society, and while there his son died intestate leaving property which under the law of Maryland descended to his father, the inmate of the home. The suit was brought upon a contract made by the defendants upon the admission of Elisha to the Home, to recover the value of this inherited property, which contract was in substance as follows: "We hereby covenant and declare that Elisha Pierce about to be admitted into the Aged Men's Home of the complainant corporation hath not now any property, and is not the recipient of any income from any source whatever; and so also covenant that should he, by any devise, legacy or otherwise, become the owner of any property whatever, we will have the same, with any now owned, conveyed and transferred to said corporation, in obedience to this covenant." This contract was adjudged by the unanimous opinion of the Court of Appeals of Maryland to be not enforceable as to the property inherited by the inmate from his son, upon the ground as

stated in the syllabus that: "A contract executed on entrance into an old men's home, whereby any property which the inmate may receive in the future is to become the property of the home, is unenforceable, as against public policy."

Aspinwall Manfg. Co. v. Gill, 32 Fed. 697, was a suit to restrain the alleged infringement of a patented machine, and the question arose whether or not an agreement to assign future improvements that the patentee might obtain upon his invention, was valid. Mr. Justice Bradley, at circuit, in speaking of the validity of such agreement, said: "That such assignments of future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid, is settled, I think, by the case of Littlefield v. Perry, 21 Wall. 226. But a naked assignment, or agreement to assign in gross, a man's future labors as an author or inventor,—in other words, a mortgage on a man's brain, to bind all of its future products,—does not address itself favorably to our consideration. It is something like engagements of an expectant heir, bind-
362 ing the property which he may afterwards inherit, which are always looked upon with disfavor by the law."

Hershy v. Clark, 35 Ark. 17 (37 Am. Rep. 1), involved the question of the validity of a contract between two brothers neither of whom were married, who by their joint industry had acquired a large property real and personal which they held in common. They entered into an agreement whereby it was agreed, that upon the death of one the survivor should hold all the interest of both in the property to the exclusion of all other persons. Upon the death intestate of one of the brothers his heirs claimed his share of the property as against the heirs of the other, who died intestate sometime after the death of the first. Of this contract the court said: "It professes to convey nothing in presenti, and cannot stand as a conveyance; nor can it be upheld as a mutual covenant. It is unreasonable and against public policy, that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property, of every nature whatever, which he at the time possesses, but also of all he may afterward acquire. Such a contract would not be enforced either in law or equity. It is obvious, too, that the brothers did not intend their obligations to have that force during their lives. * * * It was revocable at pleasure by either."

Benziger, et al. v. Steinhauser, 154 Fed. 151, cited by complainant, arose out of the same transaction involved in this suit. A demurrer to the bill was interposed, and all that is held is that the facts alleged state a cause of action, without deciding what the decision might be upon the evidence.

It is said in support of the decree under review that: "So far as the performance of the contract is concerned, this suit presents the case of an executed contract and not the case of an executory contract. * * * The claim of the defendant upon the facts, is in effect a claim that had Wirth before his death paid over to the Order what he received for the sale of his books, or for his personal services, his administrator or his heirs could nevertheless after his

death have maintained an action to recover back the amount so paid and the value of his services." This, we think is a clear misconception of the purpose of this suit, and of the status of this controversy. If the alleged contract between the complainant and Father Wirth had been fully executed, by the rendition of the services, or the conveyance of the property in controversy, to the complainant, there would of course have been no occasion for it to resort to a court of equity for the specific performance of the contract, or to establish an equitable right thereto, which the Circuit Court held the suit in effect to be, but it could have rested upon its legal title to, and possession of, the property. The fact that complainant was driven to this suit is of itself sufficient to show that the alleged contract was not in fact an executed one. The distinction between an
363 executory contract and one fully executed is nowhere more clearly or tersely stated than by Chancellor Kent, in Vol. II of his Commentaries, p. 450, where he says: "An executory contract is an agreement * * * to do or not to do a particular thing * * *. The agreement conveys an interest either in possession or in action. If for instance one person sells and delivers goods to another for a price paid, the agreement is executed and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time and for a stipulated price * * * the contract is executory and rests in action merely."

That the alleged contract was not executed as to the property in controversy, we think admits of no doubt. The fact that complainant took possession of this property, and the other effects of Rev. Wirth, after his death and removed them to New Jersey does not in the least strengthen its claim thereto, and the legal right to the property must be determined as if complainant had not thus acquired its possession, and the administrator had secured it upon his appointment and qualification. We have no doubt that as to the property in controversy, the alleged contract on the part of Father Wirth was executory only.

It may be that if Wirth in his lifetime had conveyed this property to the complainant that he could not thereafter have recovered it back, and that his legal representatives could not after his death; but of this we need express no opinion for the question is not involved.

We are of opinion also, that the complainant is not entitled to recover for another reason. It is obvious that Chapter 33 of the Rule, considered as a contract, does not forbid absolutely a member of the Order from owning and holding property in his own right. The Rule provides: "And let it be not allowed for anyone to have anything which the Abbot did not give, or permit him to have." This plainly authorizes the monk to have and hold in his own right that which the Abbot, who is the superior officer of the Order, may permit him to have. The Rule is by reference, made a part of the complainant's charter, and whatever the Rule permits the charter authorizes. The complainant cannot accept so much of the Rule as may be to its benefit, and reject that which may work to the advantage of the member.

It appears with reasonable certainty that at the time Father Wirth joined the complainant Society he owned in his own right, and had in his possession some at least of the income from his books that the Abbot of St. Vincent had permitted him to have as his own.
364 Just how much does not appear. Complainant's Abbot knew this, and he testified that the taking of the vows required of a member upon joining the Order, was always accompanied by a transfer to the Order of all property he then owned; yet he did not require of Father Wirth that he transfer to the Society that property. The Abbot also testified repeatedly that he gave Wirth permission at the time he joined the complainant Order to have and retain the income from his books as he was allowed to do at St. Vincent, and that he never required him to account therefor, even at the request of Hildebrand, the Abbot Primate in Rome, that he do so. He also testified that this literary work of Wirth's from which he derived this income was beyond *that* he was required to do for the Order. The conclusion is unavoidable that Wirth was permitted by the Abbot of St. Vincent, and the complainant's Abbot, to retain as his own property the income from his books. It is true that later in his testimony the Abbot testified that the permission given by him, and the Abbot of St. Vincent, was that he might devote the income from his books to the charitable purposes of the Orders. He was not present when the Abbot of St. Vincent gave his permission, which was many years before Wirth came to the complainant; and he failed to explain how he knew that Abbot attached any such condition to his permission; nor does he explain how Rev. Wirth while in Minnesota could have expended the income from his books for the charitable purposes of the Order in New Jersey. Again it would have been a useless thing to have given Wirth permission to have expended this income for the benefit of the complainant; and such a permission is wholly inconsistent with the conduct of the Abbot in reference to such income, for he knew that Wirth was receiving and using it for his own benefit, and if he understood that such income was to be expended for the benefit of the Order he certainly would have required of Father Wirth that he account for the expenditures, especially when requested by the Abbot Primate to do so. This he never did for the reason as he says, that Father Wirth had permission to use the same. We are satisfied beyond any doubt that Wirth had permission of both Abbots to receive the income from his books and retain it as his own property, and that the Rule upon which the complainant relies, and which is a part of its charter permits this. The legal title to, and possession of, the property in controversy was in Wirth at the time of his death, and under the statutes of Minnesota would descend to his legal heirs. The complainant by this suit seeks to divert it from that channel by showing that it was the equitable owner thereof, and that it was held by Wirth only in trust for it. The burden is upon it to establish that fact by clear and satisfactory evidence. It has failed to do so, and is not, therefore, entitled to a decree adjudging it to be the owner of the property.

This renders it unnecessary to consider the defense of the statute

of limitations; or that the probate court of Minnesota has ex-
365 clusive jurisdiction of this controversy, and some other defenses urged by the defendant. The decree of the Circuit Court is reversed, and the cause remanded to that Court with directions to dismiss the complainant's bill at its costs; and to grant the prayer of the defendant's cross bill.

It is so Ordered.

Filed March 4, 1912.

366 (*Decree.*)

And on the fourth day of March, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1911, Monday, March 4, 1912.

No. 3520.

ALBERT STEINHAUSER, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Appellant,
vs.
THE ORDER OF ST. BENEDICT OF NEW JERSEY.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, have and recover against The Order of St. Benedict of New Jersey, the sum of Five Hundred Three and 10/100 Dollars for his costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Minnesota, as the successor of the Circuit Court for said District, with directions to dismiss the complainant's bill at its costs, and to grant the prayer of the defendant's cross-bill.

March 4, 1912.

367 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth District.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein Albert Steinhauser, as Administrator of the Goods, Chattels and Credits of Augustin Wirth, deceased, is Appellant, and The Order of St. Benedict of New Jersey is Appellee, No. 3520, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-ninth day of March, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

368 In the United States Circuit Court of Appeals, Eighth Circuit.

ALBERT STEINHAUSER, Individually and as Administrator of the Goods, Chattels and Credits of Augustin Wirth, Deceased, Appellant,

vs.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a Corporation, Appellee.

Whereas a petition for a writ of certiorari to the above entitled court has been filed in the Supreme Court of the United States, praying for an order to certify the above entitled action to said Court and the said petition has been granted;

Now therefore: It is hereby stipulated that the certified transcript of record heretofore made by the Clerk of the above entitled Court to the Supreme Court of the United States and filed with the Clerk of the said Supreme Court, can be taken as the return to the writ of certiorari granted as aforesaid.

Dated June 20, 1912.

WM. H. PITZER &
WILLIAM HAYWARD,
Counsel for Appellant.
ALBERT SCHALLER AND
OTTO KUEFFNER,
Counsel for Appellee.

(Endorsed:) No. 3520. Albert Steinhauser, as Adm'r, etc., Appellant, vs. The Order of St. Benedict of New Jersey. Stipulation as to Return to Writ of Certiorari. Filed Jul- 3, 1912. John D. Jordan, Clerk.

369 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Albert Steinhauser, as Administrator, etc., of Augustin Wirth, deceased, is appellant, and The Order of St. Benedict of New Jersey is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the District of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

370 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of June, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

371 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Albert Steinhauser, as Administrator of the goods, chattels and credits of Augustin Wirth, deceased, Appellant, vs. The Order of St. Benedict of New Jersey, No. 3520, is a full, true and complete transcript with all the pleadings, proceedings and record entries in said cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this third day of July, A. D. 1912.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) 666-12/23,233. File No. 23,233. Supreme Court of the United States, October Term, 1911. No. 1157. The Order of St. Benedict of New Jersey vs. Albert Steinhauser, Adm'r, etc. Writ of certiorari. Filed Jul- 3, 1912. John D. Jordan, Clerk.

372 (Endorsed:) File No. 23,233. Supreme Court U. S., October Term, 1912. Term No. 666. The Order of St. Benedict of New Jersey vs. Albert Steinhauser, Adm'r, etc. Writ of certiorari and return. Filed July 5, 1912.

No. October Term, 1911.

The Citizens Fr. Insurance Co. of New Jersey, a corporation,

Plaintiff in Error and Petitioner,

vs.

Arthur Severance, individually and as administrator of the goods, chattels, and credits of Augustus Wirth, deceased,

Defendant in Error and Respondent.

PETITION AND BRIEF

Petition for Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

Otto Kyselka,
Arthur Severance,
Solicitors and Counsel for Petitioners.

Michael J. O'Brien,
Arthur A. Ceurvels,
Thomas D. O'Brien,
Of Counsel.

In The
United States Circuit Court of Appeals.
EIGHTH CIRCUIT.

ALBERT STEINHAUSER, individually and as administrator of the goods, chattels and credits of Augustin Wirth,
Appellant,

vs.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a corporation,
Appellee.

NOTICE OF APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI.

The appellant is hereby notified that the appellee in the above entitled suit will, on Monday, the 3rd day of June, 1912, by its verified petition and a copy of the entire record in this cause at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (copy of which and of the petition for writ of certiorari as above set forth are herewith delivered to you) to the Supreme Court of the United

States at its Court Room at the Capitol in the City of Washington, District of Columbia.

OTTO KUEFFNER,
ALBERT SCHALLER,
Solicitors and Counsels for Appellee and Petitioner.

MORGAN J. O'BRIEN,
ARNOLD & GREENE,
THOMAS D. O'BRIEN,
Of Counsel.

Service of the foregoing notice and delivery of a copy of said motion and copies of petition for writ of certiorari and brief on the 20th day of May, 1912, are hereby acknowledged.

WILLIAM H. PITZEN and
WILLIAM HAYWARD,
Solicitors and Counsels for Appellant and Respondent.

In The
Supreme Court of the United States.
October Term, 1911.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a corporation,
Petitioner.

vs.

ALBERT STEINHAUSER, individually and as administrator of the goods, chattels and credits of Augustin Wirth, deceased,

Respondent.

MOTION FOR WRIT OF CERTIORARI.

Now comes the Order of St. Benedict of New Jersey, a corporation, by their undersigned counsel, and move this Honorable Court to require by writ of certiorari or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals of the Eighth Circuit, the said court to certify to this Court for

its review and determination a certain case in said Circuit Court of Appeals pending, wherein the respondent was appellant and the petitioner, the Order of St. Benedict of New Jersey, a corporation, was appellee.

And to that end now presents its petition with a certified copy of the entire record in said case as it is in said Court of Appeals.

OTTO KIEFFNER,
ALBERT SCHALLER,
Solicitors and Counsel for Petitioners.

MORGAN J. O'BRIEN,
ARNOLD & GREENE,
THOMAS D. O'BRIEN,
Of Counsel.

In The
Supreme Court of the United States.
October Term, 1911.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a corporation.
Petitioner.

ALBERT STEINHAUSER, individually and as administrator of the goods, chattels, and credits of Augustin Wirth, deceased,
Respondent.

THE PETITION of the Order of St. Benedict of New Jersey, a corporation, for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Eighth Circuit to bring before this Honorable Court the case number 3520 there pending, entitled, Albert Steinhauser, individually and as administrator of the

goods, chattels and credits of Augustin Wirth, deceased, appellant, v. The Order of St. Benedict of New Jersey, a corporation, Appellee.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Order of St. Benedict of New Jersey, a corporation, shows to this Honorable Court as follows:

FIRST: That your petitioner is a corporation and resident of the State of New Jersey, having its principal place of business in the City of Newark, County of Essex, in said State, holding its charter by a special act of the legislature of the said State of New Jersey, entitled "An act to incorporate the Order of St. Benedict of New Jersey, approved March 5th, 1868," which act is made a public act.

That the said respondent is a resident of the City of New Ulm, County of Brown, State of Minnesota, and was duly appointed administrator of the goods, chattels and credits of Augustin Wirth, deceased, by the probate court of said Brown County and now is such administrator.

That the said deceased, Augustin Wirth, was a member of the Order of St. Benedict, your petitioner herein when he died in December, 1901, and had been such member since 1887.

That he was a Bavarian by birth, and came to this country prior to 1852 when about twenty three years of age. In that year he was ordained a Roman Catholic priest and joined and became a member of the Benedic-

tine Society or Order of Monks which was established about 1846 at St. Vincent's Mission, Westmoreland County, Pennsylvania. The society was later incorporated under a special act of the legislature of the State of Pennsylvania. Its charter and constitution are substantially the same as that of the petitioner.

In order to become a member of this Order, it was necessary, among other things, to take what are described as the vows of chastity, poverty and obedience. This Wirth did.

The effect of the vow of poverty was that all right of possessing property on the part of the individual making such vow was thereby transferred to the Order, and the taking of the vow was always accompanied by the actual transfer of all property to the Order of which the individual might then be possessed and an agreement that he should henceforth assign to the Order whatever property he might thereafter acquire.

The vow of obedience required one to subject himself to the control of the monastic authority of the Order. His immediate superior was the Abbot of the respective Abbey. Often a member was sent to a new field of work in which case he transferred his vows to the Abbey to which he was sent. Wherever he was sent and whatever his work might be he was required to account for all moneys received by him and pay over the same to his Abbot. In special cases, with his Abbot's consent, he might himself dispense money for the benefit of the Order and the community and for the proper charitable purposes for which the Order existed; but such consent was always revocable.

Upon an individual becoming a member of the Order

of St. Benedict and taking the vows mentioned, the Order agreed on its part to educate, maintain and support the member for life in sickness and health; and in case of a transfer, the new Abbey assumed the above agreement.

Father Wirth remained a member of the St. Vincent Society of Westmoreland County, Pennsylvania, until 1865 at which time he went as Prior of the monastery of the Benedictine Order in Kansas; in 1887 he transferred his membership to the petitioner and remained a member until the time of his death.

The act of the legislature of the State of New Jersey, granting the charter to your petitioner gave the ordinary rights of a corporation and further provided:

> "Sec. 2. That the essential objects of said corporation shall be the education of youth and the establishment of churches and conducting services therein."

It gave the power "to make such by-laws for their government and for the admission of members into the corporation as they shall deem necessary and proper."

The constitution and by-laws of the society provided among others:

> "Section 11. The object of this corporation is divided between the educational training of youth and the spiritual guidance of souls. Each is conducted in conformity with the principles and the general discipline of the Roman Catholic Church and in accordance with the disciplinary statutes of the Order of St. Benedict, well known throughout the Roman Catholic Church."
>
> "Section X. To become and to be a member of this corporation, it is absolutely necessary:
>
> 1. To become a member of the Order of Saint Benedict founded about the year A. D. 525 by St.

Benedict in Italy and well known in the Roman Catholic Church.

2. To have made solemn vows in the said Order and to have received the Order of Priesthood in the Roman Catholic Church."

"Section XI. Membership is lost at once:

1. By being dismissed according to the disciplinary statutes of the Order of St. Benedict of New Jersey.

2. By voluntarily leaving the Order for any purpose whatsoever.

3. By joining any other order or secret society or any other religious denominations."

"Section XII. Since the Order of St. Benedict of New Jersey is solely a charitable institution, the real estate of said Order and the individual earnings of its members, are and must be considered as common property of the Order of St. Benedict of New Jersey from which the members of said Order derive their support and the balance of which income and property should serve for following up and carrying out the charitable objects of the Order.

It is therefore agreed upon by all the members of the said Order of St. Benedict of New Jersey that no member can or will claim at any time or under any circumstances more than their decent support for the time for which they are members of the Charter of the Order of St. Benedict of New Jersey and no further.

And moreover, that each member individually pledges himself to have all property, which he now holds or hereafter may hold, in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey * * * *."

Thus was created between Wirth and the Order of St. Benedict a contract which briefly stated was that in consideration of the Order educating and caring for said Wirth during his lifetime and receiving him as a member of said Order, he agreed that he would devote his entire

time and efforts to carry out the objects of the Order, to-wit: the educational training of youth and the spiritual guidance of souls, and that all his property, present and future, should belong to the Order; to use part of the words of the contract, "to have all property which he now holds or which he may hereafter hold in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey" the petitioner. Both parties entered upon the execution of the contract and lived up to it for nearly 50 years, except that Father Wirth towards the end of his life and at the time of his demise had property in his own name which in equity and good conscience belonged to the petitioner and should have been transferred to it.

About 1897 Wirth, with permission of petitioner's Abbot became priest of a German Catholic Church Society at Springfield in said Brown County, Minnesota, went there and remained in charge of that parish until his death, December 22nd, 1901. He left a brother, a nephew and niece surviving him as his heirs at law, but left no debts other than those of his last sickness which were paid by your petitioner.

At the time of his death he had in his possession and under his control the sum of $1,500 in money, and notes and other credits to the amount of $5,000 or more, the legal title to all of which he then held.

This property was acquired by Wirth in various ways, for instance as pastor he regularly received a salary and certain perquisites; and again while a member of the Order he wrote a number of books upon religious subjects and translated others, all of which he published over his signature as "O. S. B." which meant and was under-

stood by all Catholics to mean "Order of St. Benedict," and this was done by and with the approval of the Order and the Pope. For convenience sake he was allowed to take the copyrights in his own name and also to collect the proceeds. As he was an old and learned gentleman, he was not held to a strict accounting of the property acquired by him but at times had permission of the Abbot to use the same in the first instance for his own reasonable needs and the balance for charitable objects and for the benefit of the Order.

When Wirth died the Order made application for the appointment of an administrator in the Probate Court of Brown County, Minnesota, that county being the last place of residence of the decedent, and at the hearing the heirs appeared and at their request the respondent was appointed administrator. The administrator took possession of all the property standing in the name of the decedent and also brought an action at law in the United States Circuit Court of New York to collect the royalties arising from the books written by the deceased and published by Benzinger Bros., a large publishing house.

Your petitioner applied to the equity side of said Court for an injunction to restrain the prosecution of the action until the Court of Equity had determined the true ownership of the property involved. The respondent demurred to the bill for want of equity and on the further ground that the alleged contract between Wirth and the Order of St. Vincent was void. His Honor, Judge Ray, overruled the demurrer and granted the temporary injunction.

(See Benzinger v. Steinhauser, 154 Fed. 151.)

Thereafter this present suit in equity was brought by

your petitioner in the United States Circuit Court, District of Minnesota. The object of the suit was to establish the equitable ownership of the property that had come into the possession of the deceased, Augustin Wirth, and was in his name at the time of his death, in Minnesota and elsewhere in the Order of St. Benedict, and to compel specific performance of the contract entered into by said Order and Augustin Wirth in force when said Wirth died, or as Judge Willard in his opinion expressed it:

> "The case is simply this: At the death of one who was at the time of such death a member of the Order, there is found in his immediate possession and control certain property, which by the terms of the contract between the member and the Order, belonged to the Order, but had not come into its possession; and the question is, does this property belong to the Order or to the heirs of the deceased member?"

Here again a demurrer was interposed for want of equity in the bill, etc., and this demurrer was overruled by his Honor, Judge Purdy. The respondent then answered and filed a cross bill. The case was submitted to His Honor, Judge Willard, who also decided the issues in favor of your petitioner.

(See Order of St. Benedict of N. J. v. Steinhauser, 179 Fed. 137.)

That decision upheld the position of your petitioner in all things; held that the contract was valid and enforcible, and that the objects of the Order were in consonance with the highest principles of christianity.

The Court used the following language:

> "The defendant says in his brief, page 64: 'That

the alleged contract—the acknowledgement of the rule of St. Benedict, and the taking of the vow of poverty—incapacitates a member from holding property, and entitled the complainant to demand a recognition of that incapacity in a Court of Equity, in the United States in the twentieth century, is a startling proposition; in fact in the face of the principles underlying American institutions, of personal rights so jealously guarded in all our constitutions, it is most astounding.' To me the astounding thing is not that it should be claimed that such a contract executed as this was, was valid, but that it should be claimed that it was void. It would seem to me contrary to all sense of justice to say, after a person had joined such an Order as this, had unselfishly devoted his life to the charitable purposes of its organization, had worked continually that the money derived from his labors might be used by the society for such purposes after it had been so used by it and after the man had died in full communion with the Order that his heirs, his nephews and nieces could maintain an action to recover from the Order the value of the services of their ancestor. Yet, that *must be the result if the contract made between the orator and Wirth was contrary to public policy.* That the purposes of the Order are not contrary to public policy can not for a moment be doubted. To doubt upon that point would be to doubt the doctrines of the christian religion and the teachings of the moralists of all ages."

Respondent then appealed to the United States Circuit Court of Appeals which Court reversed the decision of the Circuit Court on the ground that the contract mentioned was void as against public policy.

SECOND: Your petitioner further shows that the decision of the Court of Appeals is not only directly opposed by the decision of three Judges of the United States Court, to-wit: Judge Ray, of New York, Judge Purdy

and Judge Willard of Minnesota, but that according to the understanding of your petitioner, it is also opposed by the decisions of this Court in

Goesele et al, v. Bimeler et al, 55 U. S. 589

Schwartz v. Duss, 187 U. S. 8

and the decision of the Supreme Court of the State of Pennsylvania, in

Schrieber v. Rapp, 5 Watts (Pa.) 351,

and of the State of New York in

Burt v. Oneida Community, 137 N. Y. 546,

and of the State of Ohio in

Gasely's v. Separatists, 13 Ohio St. 144;

so that if said decision should be allowed to stand unreviewed by this Court, there would be a conflict of authorities. Said decision also is opposed to the act of the legislature of the State of New Jersey which gave the charter to your petitioner and which thereby declared that such a contract as was entered into by Augustin Wirth and your petitioner, was not opposed to the public policy of that State, and to the legislature of the State of Pennsylvania which gave a similar charter to the Benedictine Society of St. Vincents, Westmoreland County, Pennsylvania, and of which said Wirth was a member before he transferred his allegiance to your petitioner, as before stated.

THIRD: Your petitioner further shows, that the decision of the Court of Appeals is of such far reaching public importance and so affects the internal affairs of the nation as to deserve to be reviewed by the Supreme Court for the reason that it concerns all the religious orders of the Catholic Church in this Country, both male and female, that have the contract with their members, that the

individual member, shall for a valuable consideration, devote his or her life to the charitable or religious objects of the order and for that purpose turn over all his or her property to the Order. It involves also religious orders of the Episcopal church and some of the other Protestant churches and also a number of organizations organized for humane purposes.

The total membership of priests, brothers and nuns in Catholic Orders alone approximates fifty-nine thousand persons, whose relations to their Orders are thus affected, and as the Orders in turn own their churches, meeting houses, colleges, school houses, hospitals and sanitariums, in practically every State of the Union, the title to these may be drawn in question. If carried out to its full extent the decision may eventually dissolve or disintegrate the temporal organization of these Orders.

As a part of this petition, your petitioner submits herewith a certified copy of the record in this case, showing all proceedings therein both in said Circuit Court and in said Court of Appeals.

SPECIFIC ASSIGNMENTS OF ERRORS:

Your petitioner respectfully shows that the decision of the United States Circuit Court of Appeals is erroneous and failed to do justice and equity between the parties in holding:

1st: That the contract between Augustin Wirth and the Order of St. Benedict of New Jersey was not an executed contract.

2nd: That said contract was void as against public policy.

3rd: That the complainant did not establish by clear and satisfactory evidence that the property in the pos-

session of Augustin Wirth at the time of his death was held by him in trust for the complainant.

4th: That a Court of Equity could not decree an equitable title in the complainant as against the administrator of Augustin Wirth, deceased, of the property in question.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records of all proceedings of the said Circuit Court of Appeals in the said case in the said Court, entitled: "Albert Steinhauser, individually and as administrator of the goods, chattels and credits of Augustin Wirth, deceased, appellant, versus The Order of St. Benedict of New Jersey, appellee," to the end that the said case may be reviewed and determined by this Court, pursuant to the provisions of the statute in such case made and provided; and that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper.

And your petitioner will ever pray.

THE ORDER OF ST. BENEDICT OF NEW JERSEY,

Petitioner.

Morgan J. O'Brien, of New York City.
Otto Kueffner, of St. Paul, Minnesota.
Albert Schaller, of St. Paul, Minnesota.
Thomas D. O'Brien, of St. Paul, Minnesota.
Arnold & Greene, of New York City.
Solicitors and Counsel for Petitioner.

COUNTY OF NEW YORK, } ss.
STATE OF NEW YORK, }

E. HELMSTETTER being first duly sworn says: that I am the Abbott of the petitioner above named; that the foregoing petition is true of my own knowledge except as to all matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

E. HELMSTETTER,

Subscribed and sworn to before me this 10th day of May, 1912.

(Seal)

ALBERT VAN WINKLE,
Notary Public,
King's Co., No. 33.
Cert. filed in N. Y. Co., No. 13.

No. 9755.

COUNTY OF NEW YORK, } ss.
STATE OF NEW YORK, }

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, Do Hereby Certify that Albert Van Winkle, has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with

the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and seal of the said Court and County, the 16th day of May, 1912.

(L. S.)

WM. F. SCHNEIDER, *Clerk.*

UNITED STATES OF AMERICA,
COUNTY OF RAMSEY, } ss.
STATE OF MINNESOTA, }

I, THOMAS D. O'BRIEN, Attorney and counselor at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for writ of certiorari; that the same is not made for the purpose of delay and that in my opinion said petition is meritorious and well founded in law and ought to be granted and the writ issued.

That the foregoing citation of grounds in support of the petition for writ of certiorari in the above cause, are in my opinion well founded in point of law.

THOMAS D. O'BRIEN,
Counsel.

In The
Supreme Court of the United States.
October Term, 1911.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a corporation,
Petitioner,

against

ALBERT STEINHAUSER, individually and as administrator of the goods, chattels and credits of Augustin Wirth, deceased,

Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR A WRIT OF CERTIORARI.

This application is justified mainly on the ground that the decision below in the Circuit Court of Appeals is not in harmony with the decisions of this Court or with the decisions of the highest Courts of Pennsylvania, Ohio and New York; also on the ground that the decision is of such far reaching importance that all the religious and benevo-

lent orders whose members promise to devote their lives and their property to the furtherance of the good cause will be seriously affected thereby and their temporal organization will be seriously jeopardized; and on the further ground that the title to the property of said Orders valued at hundreds of thousands of dollars and used for humane, charitable and religious purposes may be called in question at the caprice of any member.

The decision of the Circuit Court of Appeals, which the petitioner herein asks to be reviewed, has to do with the validity of a contract entered into between a religious Order duly incorporated under special act of the Legislature of the State of New Jersey and known as the Order of St. Benedict of New Jersey, and one of its members, namely, the late Reverend Father Augustin Wirth.

The contract was "that in consideration of the Order receiving the applicant Father Wirth as a member of the Order, educating and caring for him during his life time, in sickness and in health, and burying him at their burial grounds upon his death," the applicant agreed that he would devote his entire time and efforts, as long as he was a member of the Order of St. Benedict, to carry out the objects of the Order, to-wit: "educational training of youth and the spiritual guidance of souls" and "that all his property, present and future, shall belong to the Order;" to use part of the words of the contract: "to have all the property which he now holds or which he may hereafter hold in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey."

Although this contract was always entered into with the intention of being for life, yet Father Wirth had the

right to discontinue the same by "voluntarily leaving the Order for any purpose whatsoever" or "by joining any other order or secret society or any other religious denomination." In the present case, however, the right was never exercised, and Father Wirth died a member of his Order.

Both parties entered upon the execution of the contract and lived up to it for nearly 50 years. Father Wirth devoted his entire life to the carrying out of the objects of the Order by teaching, officiating as pastor and writing religious books. All his books were published over his signature as "Augustin Wirth, O. S. B.", which meant to all who read the books, that they were published by a member of the Order of St. Benedict with the approval of the Order and with the approval of the Pope as ex-officio the supreme authority of the Order. Most of these books were copyrighted and for convenience sake the copyright was taken in the individual name of Augustin Wirth. He was allowed to take the proceeds of the copyrights with the understanding that he should use part of the same for his immediate personal needs and the balance in furtherance of the charitable objects of the Order.

Upon the death of Father Wirth, it was found that there stood in his own name certain bank accounts, notes and mortgages amounting to about five thousand dollars, and copyrights to a number of books written by him and published by Benzinger Brothers, a large publishing house in New York; all of which property in equity and good conscience belonged to the Order of St. Benedict and which, but for the sudden death of Father Wirth, would have been transferred to his Order had he been duly requested to do so by the Abbot.

To enforce this equitable ownership and compel a transfer of the legal title of the same from the administrator to the Order, this suit was brought.

No one can question the validity of the contract made by the parties mentioned. The decedent never did; and least of all can his heirs do so after his death. By reason of his ill health and old age, Father Wirth did not always properly and promptly account to the Order for certain property acquired by him and was so indulged for a while. That, however, is a matter of little importance and did not affect the validity of the contract he made.

A number of contracts similar to the one in question have been passed upon by the courts of last resort in several of the states, and in some instances these decisions have been reviewed by the Supreme Court of the United States. The last decisions in every instance have upheld the validity of the contracts and sustained the rights of the corporation against extraneous claimants, as well as against members of the corporation, who have sought to escape their obligations.

The leading case on this subject is that of *Goesele et al. v. Bimelar et al*, 55 *U. S.* 589, and the facts in that case are so analogous in every essential feature to those now before this Honorable Court that the case has a most important bearing upon the question now under discussion.

A society known as the Separatists emigrated to the United States from the Kingdom of Wurtemberg, Germany, where its members had been persecuted on account of their religious beliefs. They subsequently formed themselves into a community and acquired a tract of land in the State of Ohio. They adopted two constitutions and afterwards obtained an act of incorporation. The ar-

ticles of association (or constitution) which each member signed, contained an absolute renunciation of all right of individual property, and this renunciation was upon the consideration that the society would support the individual thus signing and maintain him in sickness and in health. This was considered by those signing the articles as an adequate compensation for all property transferred to the community and for all labor thereafter to be performed by them for the advancement of the common welfare.

Certain persons, claiming to be the rightful heirs of one of the members, subsequently brought an action in partition against the society for what they claimed to be his share of the property. The Court passed upon the validity of such a contract and declared that the same was not contrary to public policy.

The United States Supreme Court held, in reviewing the decision below, that no right of property had descended to these persons as heirs; that there could be no legal objection to the formation of such a community, nor WAS IT IN ANY WAY SUBVERSIVE OF PUBLIC MORALS OR AGAINST PUBLIC POLICY; that it could not be considered a forfeiture of individual rights of the community to succeed to the share of the decedent, since the ORIGINAL PROCEEDING was entirely a matter of VOLUNTARY CONTRACT.

It is submitted that the language and reasoning of the Supreme Court of the United States in that case is particularly applicable to the case now under consideration and we quote the following extracts from the decision:

> "As a general rule chancery may not enforce a forfeiture; but will it relieve an individual from his

contract, entered into fairly and for a valuable consideration? What is there in either of these articles that is contrary to good morals or that is opposed to the policy of the laws? An association of individuals is formed under religious influence, who are in a destitute condition, having little to rely on for their support but their industry, and they agree to labor in common for the good of the society, and a common maintenance for each individual, and whatever shall be acquired beyond this shall go to the common stock. This contract provides for every member of the community, in sickness and in health and under whatsoever misfortune may occur. And this is equal to the independence and comforts ordinarily enjoyed."

"The ancestor of the complainants entered into the contract fairly and with a full understanding of its conditions. The consideration of his comfortable maintenance under all circumstances, was deemed by him an adequate compensation for his labor and property contributed to the common stock."

"The complainants speak of the interest of their ancestor in the real and personal estate owned by the association and their counsel contend that the articles did not divert him of either, but both descended to his heirs at law at his death."

"This argument does not seem to comprehend the principles of the association. Land and other property were to be acquired by the members, but they were not to be vested with the fee of the land. While they remained in the society under its general regulations, the products of their labor on the land and otherwise were applied as far as necessary to their support. Beyond this they were to have no interest in the land or in the personal property. * * * * This was a benevolent scheme and from its character might properly be denominated a charity. But from the nature of the association and the object to be attained, it is clear the individual members could have no rights to the property except its use under the restrictions imposed by the articles. The whole policy of the association was founded on a principle

which excluded individual ownership. Such an ownership would defeat the great object in view, by necessarily giving to the association a temporary character. If the interests of its members could be transferred or pass by descent the maintenance of the community would be impossible. In the natural course of things the ownership of the property in a few years, by transfer and descent, would pass out of the community into the hands of strangers and thereby defeat the object in view."

"By disclaiming all individual ownership of the property acquired by their labor, for the benents secured by the articles, the members give durability to the fund accumulated and to the benevolent purposes to which it is applied. No legal objection is perceived to such a partnership."

It is apparent that the general purposes for which the Order of St. Benedict was founded are essentially similar to those of the community here cited; the pledges made by the members of both bodies are of the same character and productive of the same results; the consideration for the promise, i. e. permanent maintenance and support in sickness and health, is identical in both cases; the only differences are as to the character of the work undertaken and services rendered, and as to the precise form of the administration. It is submitted that these differences are entirely negligible and that the underlying principles upon which the decision of the Court is based are the same in both cases, and that the doctrine of the Goesele case must govern the disposition of the case at bar.

The same reasoning was followed in the case of *Schreiber v. Rapp*, 5 *Watts (Pa.)* 351 *s. c.* 30 *Am. Dec.* 327. In that case it was held that an association to which each of the members surrendered his property into one

common stock for the mutual benefit of all during their joint lives, with the right of survivorship, and reserving to each the privilege of seceding at any time during his life, is not prohibited by law.

The Court, discussing the community of property doctrine of the early Christians, says:

> "Now what was the community of property thus referred to as having prevailed in the days of the apostles, and as being the same that was intended to be revived under its scriptural sanction? It is thus described in the fourth chapter of the Acts: 'And the multitude of them that believed were of one heart and one soul; neither said any one of them that aught of the things which he possessed was his own, but they had all things in common. Neither was there any among them that lacked; for, as many as were possessed of lands or houses, sold them and brought the prices of the things that were sold, and laid them down at the apostles' feet and distribution was made to every man according to his need.'"

And it was further held that the right of succession under such circumstances is not transmissible to the personal representatives of a party to such agreement so as to enable him to recover the property of his intestate thus put into the common fund. In the agreement between the individual and the association in this case there was the same provision that the individual should receive full maintenance and support during his life.

To the same effect are also the following decisions:

Goesele v. Bimeler (*supra*)

Schreiber v. Rapp (*supra*)

Waite v. Merrill, 4 *Me.* 102, 16 *Am. Dec.* 238.

Gass v. Wilhite, 2 *Dana* (*Ky.*) 170, 26 *Am. Dec.* 446.

Burt v. Oneida Community, 137 *N. Y.* 346.

Gaselys v. Separatist, 13 *Ohio St.* 144.

The validity of such contracts has further been established by decisions of this court in cases of

Schwartz v. Duss, 93 *Fed.* 528

Schwartz v. Duss, 103 *Fed.* 567;

and in the recent decision as to the effect of such a contract, Schwartz v. Duss, 187 U. S. 8, the United States Supreme Court expressly declared that it can see no reason why the DOCTRINE OF THE GOESELE CASE AS TO THE VALIDITY AND LEGALITY OF SUCH CONTRACTS SHOULD BE DEPARTED FROM, thus establishing the ruling of that case as the settled law of the highest tribunal in the land upon the question of the validity of such contracts.

It may, therefore, safely be stated that the contract between Wirth and the Order of St. Benedict was in every respect valid and binding and enforceable in a Court of Equity against said Wirth and all persons claiming property under him either as heirs or as personal representatives.

Judge Ray, in the case of *Benzinger et al. v. Steinhauser*, 154 *Fed.* 151, overruling a demurrer to the bill in equity which is based on the same facts as this case, holds this contract valid in all its particulars, and that there is equity in the bill. After quoting and reviewing the rule of St. Benedict, the vows, the constitution and by-laws and the acts of incorporation, he sums up as follows:

> "Without deciding what the decision may be with all the facts in evidence and before the Court, it seems to me that the complaint states a cause of action in equity, SHOWS EQUITABLE TITLE IN THE CORPORATION. The Order or society, (the petitioner herein) was legally incorporated. Its

OBJECTS AND PURPOSES WERE LEGAL AND COMMENDABLE AS A WHOLE. The intestate was an active member and subscribed to the vows quoted. He actually dedicated his property rights to the uses of the society and they were treated as belonging to it. He had the consideration for the transfer which he agreed to make when necessary by adequate writings. This is the effect of the allegations of the complaint."

Then he cites a number of the cases above quoted.

"If it shall be found that the corporation (the petitioner) is the equitable owner of the copyright and contract, equity may so declare and even compel a formal transfer. Lawrence v. Dana, 15 Fed. Cas. 26; Little v. Gould, 2 Blatchf, 165, Fed. Cas. No. 8394; Pulte v. Derby, 5 McLean 328; Fed. Cas. No. 11465. It is a familiar rule in equity that that will be regarded as done which ought to be done. Many times the equitable owner is treated as the actual legal owner." Id page 154.

To consider now the decision of the Circuit Court of Appeals overruling the Court below:

The Court in its opinion says:

"Chapter 33 provides: "The vice of personal ownership must above all things be cut off in the monastery by the very root; so that no one may presume to give or receive anything without command of the Abbot; since monks are allowed to have neither their bodies nor their will in their own power; everything that is necessary, however, they must look for from the father of the monastery; and let it not be allowed for anyone to have anything which the Abbot does not give or permit him to have * * *."

"'The vow in connection with this Rule, not only binds the member in physical and mental servitude to the Order for life, or until the Head of the Church shall see fit to absolve him from his obligations, but he also surrenders all control of his will to the Order. Such an agreement is no more enforceable in the

civil courts at least, than would be an agreement by one to surrender for benefit to another his life. (See Clark's case, 1 Blackford, 122 (Ind.) 12 Am. Dec. 213 and note. In this country it is the inherent and natural right of every person to acquire and hold property in his own right; and the state is interested in preserving the liberties as well as the lives of its members, and they are guaranteed against the deprivation thereof, either by the state or by any person, individual or corporate, without due process of law. If the agreement to perform the services is not enforceable, than upon what principle can it be enforced as an equitable title or right to the fruits of such services? We are of the opinion that there is none."

In answer to this argument, we need only quote from the Opinion of Judge Willard who decided the matter below:

"The defendant says in his brief page 64 'That the alleged contract—the acknowledgment of the rule of St. Benedict, and the taking of the vow of poverty—incapacitates a member from holding property, and entitles the complainant to demand a recognition of that incapacity in a Court of equity in the United States in the twentieth century, is a startling proposition; in fact in the face of the principles underlying American institutions, of personal rights so jealously guarded in all our constitutions, it is most astounding.'" "To me the astounding thing is, not that it should be claimed that such a contract executed as this was, was valid, but that it should be claimed that it was void. It would seem to me contrary to all sense of justice to say, after a person had joined such an order as this, has unselfishly devoted his life to the charitable purposes of its organization, had worked continually, that the money derived from his labors might be used by the society for such purposes, and after it has been so used by it and after the man had died in full communion with

the Order, that his heirs, his relatives and next could maintain an action to recover from the Order the value of the services of their ancestor. Yet, that must be the result if the contract made between the orator and Wirth was contrary to public policy. That the purposes of the Order are not contrary to public policy can not for a moment be doubted. To decide upon that point would be to doubt the doctrines of the Christian religion, and the teachings of the moralists of all ages.

The defendant seized hold of some statement made by the experts on Canon Law, to the effect that the vow of poverty incapacitates a man from holding property, and then says that the right to obtain and hold property cannot be divested any more than the right to personal liberty. In this case we are not concerned with the question as to whether a person once a member of the Order of St. Benedict can ever be relieved from the vow which he took on becoming a member. It used to be said that not even the Pope himself could give him dispensation. (Lay 3, Title 7, Partida 1.) But this idea has for ages been abandoned, and that he can in the church be relieved from the vows is well settled. The witnesses on canonical law say that he could cease to be a member by secularization or expulsion, and that this takes place only with the consent of the Order. It is thus seen that a person can be relieved from his vows even by the Canon Law. But the question is, as has been said before, not what were Wirth's relations to the Order of St. Benedict, but what were his relations to the Order of St. Benedict of New Jersey. It is distinctly provided in the constitution of the complainant that a member may voluntarily leave the Order. Sec. XII of the constitution is as follows: "Membership is lost at once:

2. By voluntarily leaving the Order for any purpose whatsoever."

Wirth could at any time have severed from the complainant. If he had done so the complainant would have had no right to his future earnings. It

cannot be said then that the contract entered into between the parties when Wirth became a member of the complainant, forever deprived him of the right of acquiring property and forever incapacitated him from owning property. He could resume his right to acquire property for himself at any time he chose. With this right of voluntary withdrawal, what ground can there be for saying that the contract of 1887 was against public policy? On principle it is very clear that it cannot be said to be so, and it is equally so on authority. The state of New Jersey having incorporated this society, one of the articles of which states that only members of the Order of St. Benedict can become members thereof, it cannot be said that such an organization as the complainant is contrary to the public policy of the state of New Jersey. The legislature must have known what the religious order of St. Benedict was when it incorporated the Order of St. Benedict of New Jersey."

In short, the Court of Appeals seems to have treated the relation between the Order of St. Benedict and Father Wirth as an irrevocable contract whereby Father Wirth denuded himself of his rights forever to own any property and contracted away his entire earnings during his life.

From all the above facts it appears that this application for a writ of certiorari comes within the letter and spirit of the well-known decision of this Honorable Court in the case of

Forsythe v. City of Hammond, 166 *U. S.* 506, 514 (17 *Sup. Court Rep.* 665).

The Syllabus says:

"1. The power of the Supreme Court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, if the case is one which would other-

wise be finally determined in that court; and, while this power will be sparingly exercised, it is properly exercised where there is a conflict between a circuit court of appeals and the supreme court of the state as to whether a large body of land has been validly annexed to the territory of a city."

Justice Brewer in delivering the opinion of the Court says:

"Among the considerations thus suggested are those which indicate why in this case the court properly exercised its power and issued the writ of certiorari. There was a conflict between the decision of

"The Circuit Court of Appeals for the Seventh Circuit and the Supreme Court of the State of Indiana."

The rulings in this case were affirmed in the case of

St. Louis, K. C. & C. R. Co. v. Wab. R. Co., 217 *U. S.* 251 (30 *Sup. Court Rep.* 510).

Chief Justice Fuller says:

"With reference to the application for a certiorari, the power of this court cannot be doubted. As said in Forsyth v. Hammond, 166 U. S. 506, 514, 41 L. ed. 1095, 1098, 17 Sup. Ct. Rep, 665, 669:

'We reaffirm in this case the propositions heretofore announced to-wit, that the power of this Court in certiorari extends to every case pending in the circuit courts of appeal and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute, would be finally determined in that court.'

On the appeal to the circuit court of appeals the case was there pending for consideration and decree, and as, for reasons heretofore stated, an appeal to this court would not lie, the case can be brought here by certitorari.

The question, then, is whether the writ of certiorari ought to be granted. That question involves the construction of a prior decree of a United States Circuit Court, affirmed by this Court. It is not a

question of the payment of money, but of the extent of the use belonging to one railroad company in the tracks, right of way and terminal facilities of another, as well as the rights of access by the one company to industries established along the line of the other. This, in view of the increasing number of industries in a great and growing city like St. Louis, is of constantly enlarging importance and ought, so far as possible, to be settled. It seems to us that both the private interests of the railroad companies and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari and it is therefore so ordered."

It is respectfully submitted that in the interests of the internal affairs of the nation, in the interest of a christian community, and in the interests of a very large portion of the people of the United States, and from a spiritual and temporal point of view, the question here involved should be reviewed by the highest tribunal of the land and forever settled by its decision.

OTTO KUEFFNER and
ALBERT SCHAELLER,
Solicitors and Counsel for Petitioners.

MORGAN J. O'BRIEN,
ARNOLD & GREENE,
THOMAS D. O'BRIEN,
Of Counsel.

MAR 8 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 282.

THE ORDER OF ST. BENEDICT OF NEW JERSEY,
A CORPORATION,
Plaintiff in Error,

vs.

ALBERT STEINHAUSER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF AUGUSTIN WEBER, DECEASED,
Defendant in Error.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

OTTO KIEFFNER,
ALBERT SCHALEBEN,
Solicitors and Counsel for Plaintiff in Error.

MORGAN J. O'BRIEN,
ARNOLD S. GREENE,
FREDERICK C. GLADDEN,
Of Counsel.

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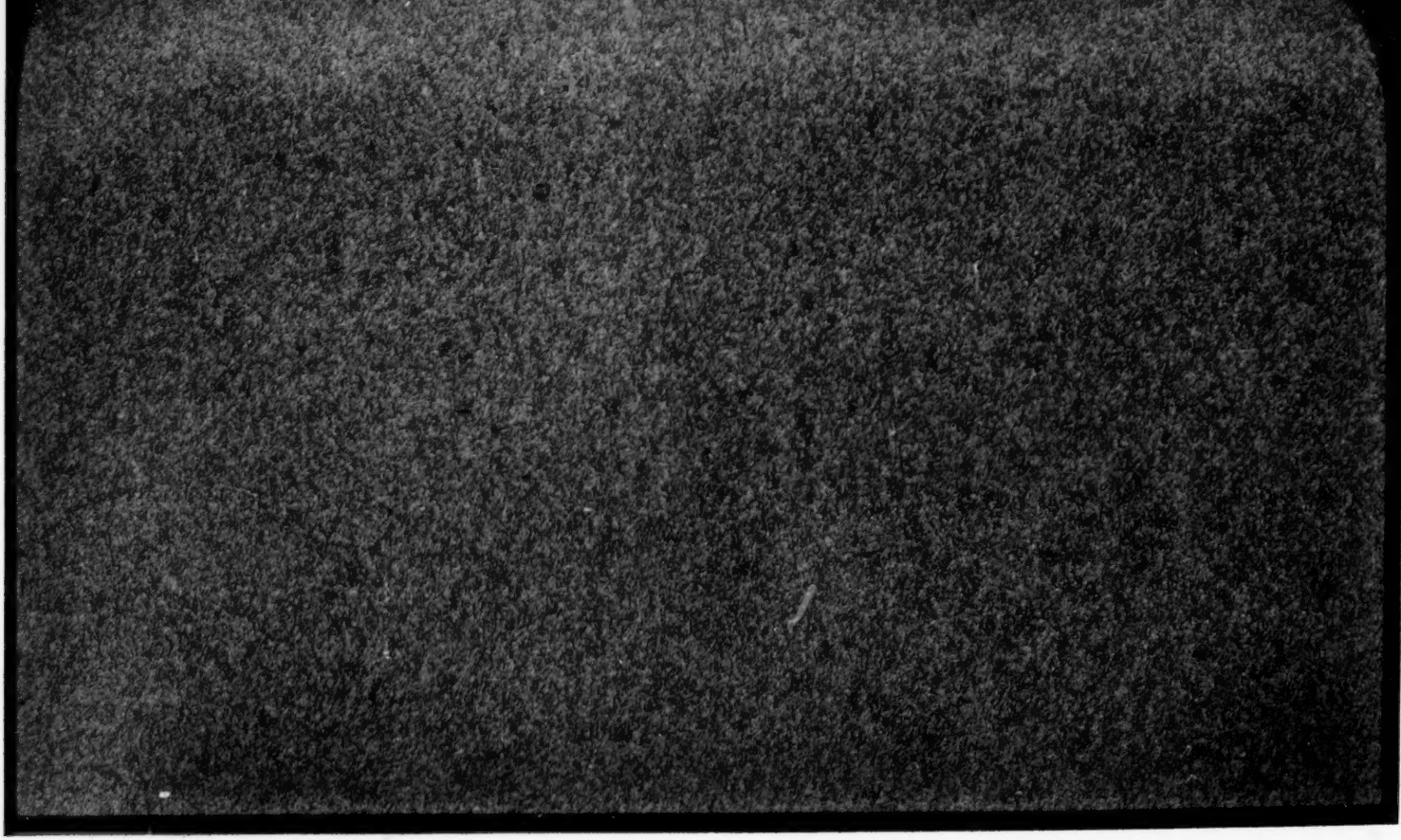

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 267.

THE ORDER OF ST. BENEDICT OF NEW JERSEY, a corporation,
Plaintiff in Error,

vs.

ALBERT STEINHAUSER, individually and as Administrator of the goods, chattels and credits of Augustin Wirth, deceased,
Defendant in Error.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR UPON REVIEW OF DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Statement.

The plaintiff in error is a citizen of the State of New Jersey, being a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of busi-

ness in the City of Newark, County of Essex and State of New Jersey (page 1 of record).

The defendant in error is a citizen of the Village of New Ulm, in the County of Brown and State of Minnesota (1).

The defendant in error's decedent Augustin Wirth, was at the time of his death, and had been for many years prior thereto, a member of the Order of St. Benedict of New Jersey, which is the plaintiff in error. By reason of that fact, and because of his relations to the said Order of St. Benedict, contractual and otherwise, which will be hereinafter fully set forth, that Order claims that it is the owner of property actually in the possession of said Augustin Wirth at the time of his death; and that it is the equitable owner of certain copyrights upon books translated and written by said Augustin Wirth which copyrights were issued in the name of "Augustin Wirth, O. S. B." (110-113).

The Order of St. Benedict is a very ancient monastic brotherhood. It was established by St. Benedict—who was born in 480 and died in 543—in the latter part of his life (79, 86). From Subiaco in Italy where the Order was founded it spread to England, to France and afterward into the Germanic countries. In 1846 it was transplanted to the United States (86, 87).

Without at present dwelling upon the enormous benefit which this Order has conferred upon humanity—and is now conferring—it is proper to say briefly that through its followers and disciples Christianity was firmly planted in various parts of England; that the greater part of central Germany was evangelized; that the German church was founded and that the Teutonic races were converted. Education has been and is now among the recognized and principal works of the Benedictines.

These statements are taken from the article entitled, "Benedictines" in the Eleventh Edition of the Encyclopedia Britannica, Vol. III. See also in the same volume the article entitled, "Benedict of

" Nursia, Saint," and in Vol. XVIII of the same work the article entitled " Monasticism."

The fundamental basis of the theory and manner of life of the members of this Order of St. Benedict and of its branches, monasteries and abbeys, wherever established, is to be found in what is known as " The Rule of St. Benedict," which was a collection of mandates and requirements which those who joined were expected to adopt and adhere to. They were rules regulating conduct and the duties of the members of the Order. Although these rules were from time to time modified to suit changing times and circumstances, in that as to some details the strict adherence to the severe rules of living has been somewhat relaxed, the essentials of the original rule still remain in full force and effect (80, 101).

The general purposes of the Order were well set forth by Rt. Rev. Hilary Pfraengle, Abbott of the Order of St. Benedict in New Jersey, who, after describing the turbulent times which existed at the birth of St. Benedict in 480, testified as follows:

" It was then that St. Benedict called together all
" those who would abandon all things that would
" distract them. He called upon them to sacrifice
" all their worldly goods and all claims thereto and
" live in community and give obedience in common,
" with the vow of chastity, and not to marry, and
" to live a community life, and in this way be able
" to teach the people, to work among them as mis-
" sionaries and to educate them, especially the
" youth. And that is how the Order came to be
" formed, and is how the vows, called the counsel
" in Holy Writ became the foundation of his rule,
" which was obedience, stability, chastity and pov-
" erty. They lived in common with each other and
" whatever they had, the community gave to the
" monastery, only claiming what they need of neces-
" sity. They have always been taken care of like
" the children of a family "—(86).

The particular feature of these rules of living as respects the principal issue before this Court is that vow which is generally known as the vow of poverty.

Chapter 33 of the original "Rule of St. Benedict" reads as follows:

"The vice of personal ownership must above all "things be cut off in the monastery by the very "root so that no one may presume to give or re- "ceive anything without the command of the "Abbott; nor to have anything whatever as his "own, neither a book nor a writing tablet, nor "anything else whatsoever; since monks are al- "lowed neither to have their bodies nor their will "in their own power. Everything that is neces- "sary, however, they must look for from the father "of the monastery; and let it not be allowed for "anyone to have anything which the Abbott did "not give or permit him to have. Let all things "be common to all as it is written. And let no one "call or take to himself anything as his own. But "if anyone should be found to indulge this most "baneful vice, and having been admonished once "and again, doth not amend, let him be subjected "to punishment" (80, 81).

This was the original expression by St. Benedict of the principle of community of goods and property as against private and individual ownership which, with the vows of stability, chastity and obedience are the foundations upon which the wonderful structure of the Benedictine Order was established. With the growth and ramification of the Order and the establishment of chapters and branches throughout the civilized world, modifications have necessarily been made in some of more rigid personal rules and observances (101), but these four cardinal principles have never been changed or altered (101)

When the Order was introduced into the United States, to the end that it should stand upon a sub-

stantial business basis, it naturally became necessary to adopt the forms of religious associations which our laws prescribe. We find, therefore, that in 1853, shortly after the Order was brought to this country, a charter was secured from the Legislature of the State of Pennsylvania incorporating Boniface Wimmer and three other "citizens of the "State of Pennsylvania and their associate "members of the society called the Benedictine "Order, being a society of religious men living in "communité, and devoted to charitable works and "the education of youth," under the title of "The "Benedictine Society," and authorizing them "to "take hold and enjoy lands, tenements and here-"ditaments, and to make such by-laws for their "governments and for the admission of members "into the corporation as they shall deem necessary "and proper: Provided that such by-laws shall not "be repugnant to nor inconsistent with the Consti-"tution and laws of the United States or of this "State" (12).

Section 2 of this Act of Incorporation provides: "That the essential objects of said corporation shall "be the relief and support of sick, destitute and "dependent persons, the maintenance of orphans, "the care and education of youth and the estab-"lishment of churches and conducting of services "therein."

This Benedictine Society at St. Vincent's, Westmoreland County, Pennsylvania, duly adopted by-laws.

Section 2nd of said By-Laws provided: "The education of youth shall be the chief "object of this Society, and strenuous efforts "shall be made to get up a large establishment at "St. Vincent's, County and State aforenamed, first "to educate young men for the Society so that they "may be able to instruct youth in all classical and

" scientific branches; second, to open it to the pub-
" lic at large in particular to the middle and poorer
" classes. Besides this essential object the society
" will not forget to attend to the other objects men-
" tioned in Section 2 of the Charter" (13).

Section 7 of the same By-Laws further provides:

" As this Society is a charitable Society, it is
" understood and agreed to by all members of it,
" and it is a condition on which every member is
" received; that each and every member of this
" Society shall give his services gratuitously, neither
" receiving nor expecting any salary, compensation
" or remuneration, except as much as needs for
" his support according to the rules of the Benedic-
" tine Order.

" Whenever, therefore, any member of this So-
" ciety shall voluntarily give up his membership or
" shall be dismissed from the Society, or shall cease
" to be a member thereof from any reason men-
" tioned in Section 4 of these By-Laws he shall have
" no right whatsoever to claim any part of the prop-
" erty of this Society, as all the property is ex-
" pressly destined for the whole Society as a means
" to carry out and perpetuate the charitable purpose
" mentioned in Section 2 of these By-Laws " (15).

Section 8th of the same By-Laws further provides that if the Society " should be suppressed or dis-
" solved by any legal or illegal authority so that
" the members thereof should be physically pre-
" vented from following their charitable pursuits or
" to live in community together according to the
" rules of the Benedictine Order " the property—not church property—of the Society shall be equally divided among the members " so as not to leave them
" remain destitute of their necessary support which
" they are justly entitled to derive from said prop-
" erty for the conservation and augmentation of
" which they had labored gratuitously *with a view*
" *to find their support for* a lifetime."

We have quoted thus fully from the charter and By-Laws of this Benedictine Society at St. Vincent's, Westmoreland County, Penna., because this was, as far as we are informed, the first home of the members of the Order of St. Benedict in this country; it was likewise, as far as we are informed the first expression of the principles and rules of the Order in conformity to the civil laws of the United States or any State thereof; and lastly, because Augustin Wirth, the defendant in error's decedent, first joined the Order at this place, as will be more fully set forth hereinafter (82).

It will thus be seen that in their very first attempt to form a civil organization for the purpose of carrying on more effectively their charitable and educational work, and in taking steps to insure its perpetuation the members of this Society were careful to clearly set forth as a prerequisite to membership the renunciation of any right of individual ownership and the necessity of living, "according " to the rules of the Benedictine Order."

It is somewhat significant also that they should have chosen to establish their first community in the State of Pennsylvania, where they were likely to be recorded the fullest measure of religious liberty; and yet that even in that State they deemed it necessary to make provision for the distribution of the community property in the event that they should be "physically prevented from " following their charitable pursuits or to live in " community together according to the rules of the " Benedictine Order" through some "legal or il- " legal authority."

It is to the credit of the nation that no such "legal or illegal authority" has hitherto disturbed them in the peaceful pursuit of doing good. Nor has their right to live their community life in their own way and in accordance with their own rules as to their property rights been ever questioned heretofore. It remained for these next of kin (a nephew and a niece) of the deceased Augustin Wirth, in

order that they might lay hands upon the little personal property which he happened to have in his possession at the time of his death, to claim that this community life and its abandonment of personal ownership for the greater good of the whole number, and the more effective accomplishment of the educational and charitable works to which the lives of all members of the Order were consecrated, was inconsistent with the "fundamental principles "of American institutions as expressed in their "constitutions" (Opinion, C. C. Appeals, 330).

In 1868 the Legislature of New Jersey incorporated "Boniface Wimmer, Roman Hill, Oswald "Mossmuller and Peter Henry Lemke and their "associates, members of the Society called the "Order of St. Benedict, being a society of religious "men living in a community and devoted to chari-"table works and the education of youth," as "'The Order of St. Benedict of New Jersey,' "* * * to take, hold and enjoy lands, tene-"ments and heriditaments, and to make such by-"laws for their government and for the admission "of members into the corporation as they shall "deem necessary and proper; provided that such "by-laws shall not be repugnant to nor inconsistent "with the Constitution of the United States or of "this State," &c. (89).

Section 2 of this charter provided that "the es-"sential objects of said corporation shall be the "education of youth and the establishments of "churches and conducting service therein" (89).

This corporation, the Order of St. Benedict of New Jersey, is the plaintiff in error in this action.

Pursuant to its charter it duly proceeded to adopt a constitution and make by-laws.

Section II of the said Constitution reads as follows:

"The object of this corporation is divided between "the educational training of youth and the spiritual

"guidance of souls. Each is conducted in conform-
"ity with principles and general discipline of the
"Roman Catholic Church and in accordance with
"the disciplinary statutes of the Order of St. Bene-
"dict, well known throughout the Roman Catholic
"Church."

Section X provides:

"To become and be a member of this corporation
"it is absolutely necessary:

"1. To become a member of the Order of St. Ben-
"edict founded about the year A. D. 525 by St.
"Benedict in Italy, and well known to the Roman
"Catholic Church.

"To have made solemn vows in the said Order
"and to have received the Order of Priesthood in
"the Roman Catholic Church" (92).

Section XI provides:

"Membership is lost at once:

"1. By being dismissed according to the dis-
"ciplinary statutes of the Order of St. Benedict of
"New Jersey approved of by Pope Pius IX for the
"American Cassinese Congregation of Benedictines.

"2. By voluntary leaving the order for any pur-
"pose whatsoever.

"3. By joining any other order or religious de-
"nominations" (92).

Section XII provides:

"Since the Order of St. Benedict of New Jersey
"is solely a charitable institution, the real estate of
"said Order and the individual earnings of its mem-
"bers are and must be considered as common prop-
"erty of the Order of St. Benedict of New Jersey
"from which the members of said order derive their
"support and the balance of which income and

" property should serve for the following up and " carrying out of the charitable objects of the Order.

" It is therefore agreed upon by all members of " the said Order of St Benedict of New Jersey that " no member can or will claim at any time or under " any circumstances more than their decent support " for the time for which they are members of the " Charter of the Order of St. Benedict of New " Jersey, and no further.

" And moreover, that each member individually " pledges himself to have all property, which he now " holds or hereafter may hold, in his own name con- " veyed as soon as possible to the legal title of the " Order of St. Benedict of New Jersey " (92).

As will be shown hereinafter, Augustin Wirth, defendant in error's decedent, was a member of the Order of St. Benedict of New Jersey at the time ef his death. The above constitution was in force at the time he joined the Order, and after his death at the time of the trial (90, 91, 93).

We have now shown briefly the history of the Benedictine Order, its relations to its members and their obligations to it as far as holding property is concerned, and the particular rules of the two American corporations comprising chapters or branches of this Order with the first of which Father Augustin was first affiliated and as a member of the latter of which, to wit, the Order of St. Benedict of New Jersey he died.

It now becomes proper briefly to review the life history of Father Augustin Wirth with particular regard to his associations with the Benedictine Order, and especially that branch thereof known as the Order of St. Benedict of New Jersey, which is the plaintiff in error in this action.

Augustin Wirth was born in Bavaria in 1828 (82, 100, 175).

In 1851 he came to this country and went to St. Vincent's Abbey in Pennsylvania as a candidate to the Order of St. Benedict there (175).

He took the solemn vows by which a candidate

becomes a member of the Order on August 15th, 1852 (82, 175).

The language of these vows made in Latin of which a translation appears in the record (82) is as follows:

"In the name of our Lord Jesus Christ,

"Amen!

"I, Brother Augustin Wirth, a Bavarian of the "diocese of Wuerzburg to the honor of Almighty "God, of the ever Blessed Virgin Mary, and our "holy Father St. Benedict, and of all the saints, by "these present vows promise stability and the con-"version of my morals, and obedience according to "the Rule of the same holy Father St. Benedict in "the presence of God and His Saints, whose relics "are here present in the church, and also in the "presence of the Right Reverend Father in Christ "and Lord Boniface, the Superior of this Monastery "of St. Vincent, and of you Rev. Fathers and "Brothers here present; in the name of the Father, "and of the Son and of the Holy Ghost, Amen.

"In witness whereof I have written with my "own hand this present paper in this venerable "place of St. Vincent, in the year one thousand "eight hundred and fifty-two from the Incarnation "of Our Lord, on the feast of the Assumption of "the Bl. Virgin Mary, the fifteenth day of August.

_____ _____,

(Sign of the Cross)."

As this term "Stability" occurs at various places in the record, and hence necessarily in this brief, it seems proper to refer to its exact significance in this connection. We are not left to canonical interpretation, or to the definition given solely by members of the Order. For that the term has now a generally understood meaning is apparent from Funk & Wagnall's New Standard Dictionary (1913), where the word is defined as follows: "A vow to continue "in the same profession or order, taken by some "Benedictines."

The solemnity of this vow is apparent not only from the language itself, but from the further fact that it is signed by the candidate making the sign of the cross thereon upon the altar of the sanctuary after the formal making of the vows (82).

Father Augustin Wirth did not, however, remain long as a member of the particular branch of the Order at St. Vincent's in Pennsylvania. He continued in or near St. Vincent's for a short time, having charge of a church in Greenburgh, Pa., as rector or pastor from 1853 to 1857 (101). In 1857 he left Greenburgh to go to Kansas to establish and build a church there. He built and established a church and college there, and the church subsequently became an Abbey (102, 175).

Father Wirth remained in Kansas till 1868 (102, 175). Without going into details of all his movements subsequent to this latter date, it is sufficient to state, for the purposes of this brief, that he was sent to various places in Minnesota during the years 1868–1875 (175). In 1875 we find him back again at Greenburgh, Pa., in charge of a congregation at that place, and there he remained till 1880. In 1880 he went to Elizabeth, New Jersey (102, 154, 176). He remained there in charge of a church till 1887 (154, 176). From April, 1887, to May 23, 1889, he was continually at St. Mary's Abbey in Newark, which is the home of The Order of St. Benedict of New Jersey (95, 154, 176). During this period he was unable to do any outside work, had to be taken care of, and at one time had to go to the hospital for an operation. He was suffering a great deal from rheumatism and swollen knees (95).

It was during this period, to wit, on May 15, 1887, that he became a member of the Order of St. Benedict of New Jersey (84, 102, 176).

The record does not show when Father Wirth transferred his stability from St. Vincent's Abbey in Pennsylvania to the Order of St. Benedict's in Kansas. It probably took place when the church he established there became an Abbey. However that

may be, it is evident that he had made the formal transfer to the Kansas Order of St. Benedict's. This is apparent from the formal instrument by which he transferred his stability to and became a member of the Order of St. Benedict of New Jersey. This document, which is in Father Wirth's own handwriting, is as follows (84):

"Herewith I declare and testify that I, the undersigned, having first obtained the permission of both Rt. Rev. Abbots, namely, the Rt. Rev. Innocent Wolf, Abbot of St. Benedict's in Kansas, and the Rt. Rev. Hilary Pfraengle of St. Mary's in Newark, N. J., do voluntarily transfer my stability from the Abbey of St. Benedict in Kansas to the Abbey of St. Mary, Newark, N. J.

"In faith thereof with my own hand:

"AUGUSTIN WIRTH, O. S. B.
"HILARY PFRAENGLE, O. S. B.
"Abbot of St. Mary's, N. J."

"(SEAL OF ST. MARY'S ABBEY, NEWARK, N. J.)
"Approved, the undersigned
"ARCHABBOT BONIF. WIMMER,
"President of Congregation.
"May 18th, 1887.
"SEAL OF THE PARISH OF THE CONGREGATION.
"I give my consent,
"INNOCENT WOLF, O. S. B.
"Abbot, the 15th of May, 1887."

It is particularly worthy of note and we desire especially to call the attention of this Honorable Court to the fact that the transfer was made under these circumstances, inasmuch as we deem that it has a most important bearing on this controversy. Father Wirth came to the Abbey of St. Mary's in Newark, the home of the Order of St. Benedict in New Jersey on April 3, 1887. He was sick and incapacited from doing outside work (95). He was not a member of the Order in New

Jersey. But he wanted that care and attention in ill health to which he would be entitled if he became a member. Hence he transferred his stability and became entitled to all the privileges incident to living in community with the members of the Order of St. Benedict in New Jersey. And at the same time he assumed all the obligations and became subject to all the rules governing the conduct and relations of each member to the said Order as set forth in the Charter, Constitution and By-Laws above set forth, which were in force at this time and remained in force throughout his life (90, 91, 93). And included in such rules was Section XII of the Constitution, which has been hereinabove fully set forth and which provided specifically that the individual earnings of each member should be the common property of the Order; that it is agreed by all members of the Order that no member can claim more than his decent support during his membership; and that each member pledges himself to have all property "which he now holds or "hereafter may hold in his own name conveyed as "soon as possible to the legal title of the Order of "St. Benedict of New Jersey."

Father Wirth next went, in June, 1889, to a church under the control of St. Mary's Abbey in Wilmington, Delaware, and remained there till November of the same year (103, 176). After that he returned to his church in Elizabeth, New Jersey, and remained there till the summer of 1897, when he went to Europe and traveled about for his health till the spring of 1898 (155, 158, 176).

At about this time Father Wirth was getting old and sickly and disgruntled with his work (169, 179). He was 70 years old and he became possessed of a desire to go somewhere else. He wanted a change. Consequently he wrote to Archbishop Ireland of St. Paul who had a German congregation in his diocese and who was in need of German priests. When Archbishop Ireland expressed himself as willing to have him come to

Minnesota he secured permission from Abbot Pfraengle of St. Mary's to go there (103, 161, 169, 171, 172).

He went then to Springfield, Minn., in the fall of 1898, and remained there till he died in December, 1901 (103, 176), and was buried in the graveyard of St. John's Abbey in Stearns Co., Minn., a Benedictine cemetery, at the request of Father Hilary Pfraengle Abbot of St. Mary's of the Order of St. Benedict of New Jersey (187).

He was buried in the funeral garb prescribed by the Order of St. Benedict (195, 234), and this was done in accordance with Father Wirth's personal instructions before his death (237).

The financial report of St. Raphael's Church in Springfield, Minn., for the year ending January 1, 1901, the last official document which he executed, was signed by him "Augustin Wirth, O. S. B." (239).

The funeral expenses were advanced by Father Peter Engle, Abbot of the Abbey of St. Johns of the Order of St. Benedict, at Collegeville, Minn., who testifies that Father Wirth was a member of the Order of St. Benedict at the time of his death (195). Subsequently Abbot Engle repaid himself from money's found in Father Wirth's possession when he died, sending the balance and Father Wirth's personal effects to Abbot Hilary Pfraengle at Newark (96, 97, 192, 193). Father Wirth also left some unsatisfied bills, which were paid by the Order of St. Benedict of New Jersey (98).

Father Wirth never transferred his stability to the Abbey in Minnesota but remained a member of St. Mary's Abbey in Newark and of the Order of St. Benedict in New Jersey up to the time of his death (95, 144, 166).

There was some attempt to claim at the trial that Father Wirth had abandoned his membership in the Order of St. Benedict. It may be possible that somewhere in this voluminous record there is some such suggestion. We have not been able to find it.

But in any event the evidence is so overwhelmingly to the contrary that the learned Judge of the Circuit Court stated emphatically that "he did not "separate himself nor attempt to separate himself "from the Order but died within it" (299).

And the learned Judge who wrote the opinion for the Circuit Court of Appeals states: "The decree "of the Circuit Court, however, includes the find- "ing as a fact that Wirth did not withdraw from "the complainant Order but remained a member "thereof until his death, and that finding is not so "without support in the testimony as to warrant "setting it aside. The case, therefore, will be de- "termined on the assumption that Wirth remained "a member of the complainant Order until his "death" (328, 329).

We may consider that fact, therefore, as positively established, and indeed, as we have above indicated, we are unable to locate a scintilla of evidence to the contrary.

As was indicated at the outset of this brief, Father Wirth was the author of a number of religious works to which he had taken out copyrights in the name of Augustin Wirth, O. S. B. (2, 111–113). He had also entered into a contract for the sale and distribution of these books with a Catholic publishing firm known as Benziger Bros., of New York City, upon agreed royalties (2, 3, 9–11, 66). The moneys received from the sale of these books prior to the death of Father Wirth had been paid to him (3, 68); and thereafter by the said Benziger Bros. to the Order of St. Benedict (4, 68) up to the 17th of October, 1906 (68), when they were sued by Steinhauser, the administrator of Augustin Wirth for these royalties (71).

Prior to this agreement with the Benziger Bros., Father Wirth had been publishing and selling books with the permission of his superiors (146, 149). It is principally the proceeds of the sales of these books, the right to the copyright on them taken in the name of Augustin Wirth, O. S. B., after the expira-

tion of his contract with the publishers, and the credit due for books sold prior and subsequent to his death that constitutes the property in controversy in this litigation.

There is no doubt and it is openly conceded that Father Wirth was not obliged to account directly for the proceeds of the sales of these various books. This the defendant in error contends indicates that such proceeds were his own property. It appears that Father Wirth had always to account for all other moneys received, the same as every other member of the Order (94), and even, as a matter of fact, when he was receiving a salary from the various churches to which he was assigned he had to account for that. Even although when he was in Elizabeth, New Jersey, he received a regular fixed salary, he was none the less obliged to account therefor to the Abbot Pfraengle at Newark (94, 165). And even when he was away on permission "*ad tempus*" he was liable to be recalled at any time (131), and if he were at a distant place he had to account to the Bishop of the diocese where he was stationed (160).

Father Wirth, however, as to these sums received from the sale of his books, had special permission to retain the money, but he could not dispose of it without the permission of his superiors (149). This special privilege was upon the understanding that he could keep these moneys, not as his own, but have the use thereof for charitable purposes with the permission of his superiors (165).

Even in the expenditure of special sums he had to have permission. The moneys referred to which he realized from his books were regarded not as his own, but because this work was supererogatory, or work he was not obliged to do, and work that he did in his spare hours, he could hold the moneys for use by permission for charitable work (150, 166).

This privilege had originally been given to Father Wirth by the Archabbot of St. Vincent's Abbey, and was thereafter continued by Abbot

Hilary Pfraengle when Father Wirth came to St. Mary's Abbey in Newark (173, 177). Although Father Wirth had done some work of this nature prior to joining the Order of St. Benedict in New Jersey (173), it was about the time when he joined the Order there, as Abbot Hilary Pfraengle testifies, "that he began to work in earnest in translating, "and so forth" (105).

Further, Abbot Pfraengle testifies that "his "works were not compositions, his works consisted "in translations from other languages excepting "the sermons, which are some his and others are "those that he got by asking for them from priests" (105).

As to this permission and its effect, the learned trial Court, after carefully considering the evidence on this head, said: "I find, however, as a fact, that "the permission was to use the money only for "charitable purposes. The evidence does not justify "a finding that there was a permission that the "money which he received from the sale of his "books should belong to him as an individual" (305).

There is reference in the opinion of the learned Circuit Court of Appeals to alleged disputes between Father Wirth and Abbot Hilary Pfraengle. The language is as follows:

"After Father Wirth joined the complainant "Society in 1887, the relations between him and its "Abbot were not pleasant or satisfactory to either, "and Wirth at times was desirous of leaving the "monastery. They had many acrimonious dis-"putes over matters pertaining to the Order; but "none regarding the money received by Wirth as "the income from his books," &c. (327).

This statement, in the opinion of the learned Circuit Court of Appeals, if left to stand without comment might well serve to convey what we respectfully conceive to be a very erroneous expression of the true situation. It depends for its verification

solely upon the testimony of one Thomas J. Keogh, who was a member of the church in Elizabeth, of which Father Wirth was pastor. Keogh testifies that he first met Father Wirth in St. Mary's Abbey in 1887; that Father Wirth "wasn't doing anything "in the Abbey at that time;" that he was tired and sick of it and wanted to get back to the church; that he and Father Hilary were always quarreling and could not agree; that in 1889 Father Wirth came back to the church; that there was some trouble about the church moneys; that Father Hilary insisted upon proper accounts; that these accounts were first made up by "the Sister;" that subsequently when Father Hilary said they were not correct the witness Keogh "made them up "afterwards and found several mistakes in them "which should not have been there; and that this "controversy concerning these church moneys "lasted from April, 1887, to November, 1889" (265, 266).

This is the only testimony in the record which tends to support the statement of the learned Circuit Court of Appeals as to the "many acrimonious dis-"putes" with the exception of the time of Father Wirth's resignation from the Elizabeth church and his trip to Europe in 1897 which will be referred to hereinafter.

As to this episode to which Keogh testifies it will be remembered from the account of Father Wirth's life hereinabove set forth, that he had been pastor of this Elizabeth church from 1880 to 1887, while he was a member of the Order of St Benedict of Kansas; that he came to the Abbey of St. Mary's on April 3, 1887, and joined the Order of St. Benedict there April 15, 1887; that he remained at the Abbey of St. Mary's till June 1, 1889, went then to Wilmington, Delaware, for five months and returned to Elizabeth in November, 1889; and that while he was at St. Mary's Abbey he was a great sufferer from rheumatism and swollen knees and had to go to the hospital at one time for an opera-

tion (95, 154, 176). He was at this time (in 1889) sixty-one years old. He had joined the Order in 1852 when he was twenty four years old, and thus had been for nearly forty years in active service. Most of the time he had been in charge of a church as rector, and he naturally chafed at not being able to do the outside work which was evidently more to his liking.

It is respectfully submitted that viewed from its proper angle this testimony places a very different light upon Father Wirth's mental attitude at this time, to wit, 1887–1889, and also removes the impression which might otherwise be derived from the language above quoted from the opinion of the learned Circuit Court of Appeals that he was in a state of continual dissatisfaction with respect to his membership in the Order of St. Benedict.

One other episode in his life must be referred to in this connection. This concerns the time of his resignation from the parish of the Church of the Sacred Heart in Elizabeth with which he had been associated since 1880.

As Keogh testifies, Father Wirth was a pretty sick man at this time, August, 1897. He took him to St. Michael's Hospital in Newark, where he remained for about a week. Then he went to Latrobe in Westmoreland County, Penna., which was near the scene of his early life; after that he came to New York, where he remained about two weeks in the Astor House, and then went to Europe. On his return from Europe he stayed about a week in a New York hotel, then a week at Keogh's house in Elizabeth and then he went to Minnesota (267-268).

It is conceded by the plaintiff in error that this trip to Europe was without permission of Abbot Hilary Pfraengle, Father Wirth's superior. As Abbot Pfraengle testifies, Father Wirth got old and was sickly. "He was disgruntled, he was not well, "he was sickly, and one time he would write that "he was going to give up his parish work and "another time he would want me to coax him to

" stay and I did once and he was dissatisfied again " and he wanted to go, and I would tell him again, " ' You ought to try again,' and I got him help, and " at last he got so disgruntled that he left without " permission " (179).

He traveled round through Europe for about eight months for his health, and visiting various monasteries as well as going to Rome (103, 155, 158) and took out the money for this trip presumably from the moneys which he was allowed to keep from his royalties (158).

This going abroad without leave and the failure to account for church moneys during the last three years of his life (169, 170) caused him to be admonished by the Abbot Primate, O. S. B., from Rome (170, 171), who also wrote a letter on the subject to Abbot Hilary Pfraengle (182, 183).

Father Wirth was anxious, however, to give up the Elizabeth charge (179) and finally Abbot Pfraengle had asked him to leave that charge. Thereupon Bishop Wigger, the Bishop of Newark, communicated with Archbishop Ireland of Minnesota; and on August 23, 1898, Bishop Wigger wrote to Abbot Pfraengle stating that the Archbishop of St. Paul had a place open for Father Wirth and asking Abbot Pfraengle to give him permission to accept that parish "*ad tempus*" (161, 171, 172). Abbot Pfraengle granted this permission, which was communicated to Father Wirth by Bishop Wigger on August 25, 1898 (169). It was upon the condition that Father Wirth should submit to the decision of the Abbot Primate upon the appeal made by him (169).

As Abbot Pfraengle had consented that Father Wirth should accept the church at Springfield, Minnesota, he evidently concluded in view of the advanced age of Father Wirth, who was seventy-one at this time, and especially as Father Wirth in Minnesota would be responsible to the Bishop of the diocese there for any church moneys (160), that it would not be necessary to insist upon the disci-

plinary measures recommended by the Abbot Primate (182, 183).

It is, however, to be noted that as far as Father Wirth was concerned, he was under the supervision and authority of Abbott Pfraengle even in Minnesota, except as far as the affairs of his church there were concerned for which he was responsible to Archbishop Ireland (196, 197). He was given permission to go there merely "*ad tempus*" (172), and was liable to be recalled at any time (131).

As has already been shown, *supra*, he never transferred his stability to the Minnesota Abbey; he died a member of the Order of St. Benedict, of New Jersey; he was buried in Benedictine garb and in a Benedictine cemetery at the request of Abbot Pfraengle; his funeral expenses were defrayed from funds found in his possession and the balance thereof and his personal effects were forwarded to the Order of St. Benedict of New Jersey.

It is still further to be noted that Father Wirth was engaged in building a new school in Minnesota (153, 235). He seems to have had special capacity for this kind of work as he had previously built up a college and church that afterward became a monastery in Kansas (154). Also Keogh testifies that Father Wirth told him, in 1889, that he (Wirth) had given to St. Mary's Abbey at Newark $11,000 (269). This sum, of course, must have been derived from the sale of his books and it is significant as showing that Wirth himself realized that even though he had the privilege temporarily to retain the proceeds of the sales of these books, such proceeds must eventually be disbursed for charitable or educational purposes.

We desire also to call to your Honors' attention the testimony of Mr. Nicholas Benziger, of the firm with whom Father Wirth had a contract for the sale and distribution of his books. Benziger was born in Einsiedeln, Switzerland, in which place there is a convent of the Benedictine Order more than a thousand years old. He went to school

there, so he became familiar with the Benedictine Order. He knew that members of the Order were not allowed to hold property. He understood that his contract made with Augustin Wirth, O. S. B., was a contract on behalf of the Order. He knew that "an agreement made with a Benedictine is as "good as if I made it with the head of the Order." The reason why the O. S. B. was put in the contract "was to show that we made the contract "with the Benedictine and not with a private per-"son" (69, 70).

Benziger further states, "I can tell you if it "hadn't been for the O. S. B. we wouldn't have "made this contract with Father Wirth. If Father "Wirth hadn't been a Benedictine we wouldn't "have made this agreement." Also that if there had been any doubt as to its being made by Wirth for the benefit of the Order "I would have put in "the agreement to whom it was to be paid after his "death" (75). But that it was the understanding between the parties that any moneys due on the contract after Wirth's death should be paid to the Order (75). And after his death such sums were paid to the Abbot of the Order of St. Benedict in Newark (68).

The Assignments of Errors.

The plaintiff in error respectfully shows that the decision of the United States Circuit Court of Appeals for the Eighth Circuit is erroneous and failed to do justice and equity between the parties in holding:

1st. That the contract between Augustin Wirth and the Order of St. Benedict of New Jersey was not an executed contract.

2nd. That said contract was void as against public policy.

3rd. That the complainant did not establish by clear and satisfactory evidence that the property in

the possession of Augustin Wirth at the time of his death was held by him in trust for the complainant.

4th: That a court of equity could not decree an equitable title in the complainant as against the administrator of Augustin Wirth, deceased, of the property in question.

THE ARGUMENT.

POINT ONE.

The contract between Augustin Wirth and the Order of St. Benedict of New Jersey was fully executed.

It is important to note at the outset just what was the contract between The Order of St. Benedict of New Jersey and Father Augustin Wirth. As has been shown in the foregoing statement Father Wirth came to this country prior to 1852, having been born in 1828 (100), and in the year 1852 was ordained a Roman Catholic priest and became a member of the Benedictine Society of St. Vincent's in Westmoreland County, Pennsylvania, taking at that time the solemn vows requisite to membership, by which, among other things, he promised "stability and the conversion of my morals and "obedience according to the Rule of the same holy "Father St. Benedict" (82). That "rule" was and is a collection of such mandates and requirements as were prescribed by St. Benedict for those who wished to join his order and be under his guidance (80). This 'rule" was written and the Benedictine Order established in the latter part of the life of St. Benedict, who was born in 480 A. D., and died in 543 A. D. (79). The date of the establishment of the Order is mentioned as "about the year A. D.

"525" in the constitution of the Order of St. Benedict of New Jersey (92).

One of the subdivisions of this rule, known as Chapter 33, provides as follows:

The Chapter is entitled: "Whether Monks ought "to have anything of their own," and reads:

"The vice of personal ownership must above all "things be cut off in the monastery by the very "root, so that no one may presume to give or re- "ceive anything without the command of the "Abbot; nor to have anything whatever as his "own, neither a book or a writing tablet, nor a pen, "nor anything else whatsoever; since monks are "to have neither their bodies nor their will in their "own power. Everything that is necessary how- "ever they must look for from the father of the "monastery; and let it not be allowed for anyone "to have anything which the Abbot did not give "or permit him to have. Let all things be common "to all as it is written. And let no one call or take "to himself anything as his own. But if anyone "should be found to indulge this most baneful vice, "and having been admonished once and again doth "not amend, let him be subjected to punishment" (80, 81).

In 1853 the Benedictine Society in Westmoreland County, Penna., was duly incorporated by an Act of the Pennsylvania legislature (13). The by-laws of that corporation provided that Section 3rd "As "members of this corporation are *ipso facto* ad- "mitted all those members of the Benedictine Order "in the United States:

"1st. Who belong to the Abbey of St. Vincent's, "Westmoreland County, Penna.

"2nd. Who made their solemn profession to the "Order.

"3rd. Who have been ordained priests" (14).

As has been shown above Augustin Wirth had complied with all these requirements in 1852 so that he became and was a member of the Pennsylvania Benedictine Corporation.

By Section 7 of these Pennsylvania By-Laws it was provided as follows:

"As this Society is a charitable Society it is under-
"stood and agreed to by all members of it, *and*
"*it is a condition on which every member is re-*
"*ceived*, that each and every member of this So-
"ciety shall give his services gratuitously, neither
"receiving nor expecting any salary, compensation
"or remuneration except as much as needs for his
"support *according to the rules of the Benedictine*
"*Order*" (15).

We find thus specifically expressed not only the solemn contract with the Benedictine Order as evidenced by the vows signed by Father Wirth upon the altar with the Holy symbol of the Cross (82), but also the civil contract with the Pennsylvania Benedictine Corporation as expressed in Section 7 of the By-Laws of that corporation, which bound Wirth, with respect of any property, to have supplied him only sufficient for his needs "according to the rules "of the Benedictine Order" which rules include Chapter 33 thereof hereinabove set forth.

Wirth remained a member of the St. Vincent Society and Corporation till 1865, when he went to Atchison, Kansas, to take charge of, and conduct, St. Benedict's Monastery, St. Benedict's College and St. Benedict's Church at that place (5, 6, 325). He remained a member of the Kansas Order till May, 1887, when the transferred his vows and stability to St. Mary's Abbey in Newark, N. J., and to the corporation known as the Order of St. Benedict in New Jersey (6, 325). This transfer was formally made with the consent of Abbot Innocent Wolf, Abbot of St. Benedict's in Kansas, Abbot Pfraengle, Aobot of St. Mary's, New Jersey, and Archabbot

Boniface Wimmer as the President of the Congregation (84, 85).

The record does not show what were the Constitution and By-Laws of the Order of St. Benedict in Kansas which had become incorporated before Augustin Wirth transferred his stability to the New Jersey Order (6).

It is probable that they were similar to the charters and by-laws of the Pennsylvania and New Jersey corporations. However, that is not of consequence in this discussion, inasmuch as Wirth, as has been shown, left the Kansas branch in 1887 and became then a member of the New Jersey corporation, retaining his membership therein until he died (95, 166).

The Order of St. Benedict in New Jersey was duly incorporated by an Act of the New Jersey Legislature on March 5, 1868.

Its charter provided that the incorporators and their associates "members of the Society called the "Order of St. Benedict, being a society of religious "men living in community and devoted to chari- "table works and the education of youth be and "they are hereby constituted a body politic and cor- "porate by the name and style of the 'Order of St. "'Benedict of New Jersey' to have perpetual suc- "cession, to use a common seal and alter and renew "the same at pleasure; to take, hold and enjoy "lands, tenements and hereditaments, and to make "such by-laws for their government and for the "admission of members into the corporation as they "shall deem necessary and proper; provided that "such by-laws shall not be repugnant to nor incon- "sistent with the Constitution of the United States "or of this State; provided also that the clear yearly "income of the real estate to be held by said cor- "poration exclusive of the houses occupied by the "Order in this State and grounds thereto attached, "shall not exceed the sum of three thousand dol- "lars" (89).

Section 2 of the Charter provides:

"That the essential objects of said corporation "shall be the education of youth and the estab- "lishments of churches and conducting services "therein."

The corporation duly adopted a constitution. Section II thereof provides:

"The object of this corporation is divided between "the educational training of youth and the spiritual "guidance of souls. Each is conducted in con- "formity with principles and general discipline of "the Roman Catholic Church *and in accordance* "*with the disciplinary statutes of the Order of St.* "*Benedict* well known throughout the Roman "Catholic Church."

By the "disciplinary statutes of the Order of St. "Benedict" is meant of course those mandates laid down by St. Benedict when he founded the order, and hereinbefore frequently referred to as the "Rule of St. Benedict," which included Chapter 33 thereof respecting the holding of property by monks, which chapter has been fully above set forth (91).

Section X of the said Constitution prescribes the requisites for membership as follows:

"To become and be a member of this corporation "it is absolutely necessary:

"1. To become a member of the Order of St. "Benedict, founded about the year A. D. 525 by St. "Benedict in Italy, and well known in the Roman "Catholic Church.

"To have made solemn vows in the said Order "and to have received the Order of Priesthood in "the Roman Catholic Church" (92).

Section XI of the said Constitution reads:

"Membership is lost at once:

"1. By being dismissed according to the discip- "linary Statutes of the Order of St. Benedict of

" New Jersey, approved of by Pope Pius IX for the " American Cassinese Congregation of Benedictines.

" 2. By voluntary leaving the Order for any pur- " pose whatsoever.

" 3. By joining any other Order or secret society " or any other religious denominations " (92).

The learned Circuit Court of Appeals in the discussion of the contract between Father Wirth and the Order of St. Benedict of New Jersey has stated in its opinion:

" It is necessary to read into the vows of Father " Wirth the ' vow of poverty ' so much relied " upon by complainant, for it is not expressed in " the vows written by him. But admitting without " deciding that such testimony is competent to " show the meaning and effect of the vows, in con- " nection with the Rule of St. Benedict upon the " right of Wirth to thereafter acquire and hold " property in his own right under the canon law: " that law is of no intrinsic authority outside the " jurisdiction of its origin or countries observing " that system of law except as it is sanctioned by " statute or immemorial usage " (329).

In the first place we feel reluctantly constrained to differ with the learned Circuit Court of Appeals as to the necessity of reading into the vows of Father Wirth the vow of poverty, since he specifically promised when he joined the Order of St. Benedict in Pennsylvania " obedience to the Rule " of the same holy Father St. Benedict in the pres- " ence of God and His Saints " (82) and it has been shown again and again in the record and in this brief that the said Rule included Chapter 33 thereof which contains this " vow of poverty." Further, the charter of the Pennsylvania corporation is granted to " members of the Benedictine Order, " being a society of religious men living in com- " munité," that is, in common ownership of all

property as distinct from personal ownership, with the right to make by-laws. And by such by-laws (Section 7) the members are received only on condition of accepting nothing but what is necessary for their support, "according to the rules of the "Benedictine Order," which again includes the vow of poverty—set forth in Chapter 33 (15).

Again, the charter of the New Jersey Order is granted to "members of the Order of St. Benedict, "being a society of religious men living in com- "munity, with the right to make by-laws for their "government and admission of members." And as we have seen by their constitution, they have expressly stated that they are governed by the statutes of the Order of St. Benedict, and membership can only be had by members who have made "solemn vows in the said Order." And these solemn vows, as has just been shown, include the promise of "obedience to the Rule of the same Holy Father "St. Benedict" which contains Chapter 33 thereof, the vow of poverty.

We submit, therefore, that even without the further expression in the Constitution of the New Jersey Order to which we shall directly refer, it is not necessary to "read into the vows of Father "Wirth the 'vow of poverty'" for the very simple reason that his vows and the conditions prerequisite to his admission into the Order of St. Benedict in Pennsylvania and afterward into the New Jersey Order of St. Benedict include definitely and positively in every instance the absolute necessity that he shall have made this vow of poverty.

But the Constitution of the Order of St. Benedict does not stop at this point, although we maintain that if it had the complainant would still have been entitled to the relief demanded.

Section XII provides as follows:

"Since the Order of St. Benedict of New Jersey "is solely a charitable institution, the real estate of "said Order and the individual earnings of its mem-

"bers are and must be considered as common "property of the Order of St. Benedict of New Jer- "sey from which the members of said Order derive "their support and the balance of which income "and property should serve for the following up "and carrying out of the charitable objects of the "Order.

"It is, therefore, agreed upon by all the members "of the said Order of St. Benedict of New Jersey, "that no member can or will claim at any time or "under any circumstances more than their decent "support for the time for which they are members "of the Charter of the Order of St. Benedict of New "Jersey, and no further.

"And moreover, that each member individually "pledges himself to have all property, which he "now holds or hereafter may hold in his own name, "conveyed as soon as possible to the legal title of "the Order of St. Benedict of New Jersey" (92).

Had there been any doubt from the broad general vows and from the other provisions of the Charter and Constitution of the Order of St. Benedict of New Jersey, as to Father Wirth's right to acquire and hold property for his own personal use as long as he remained a member of this corporation, this Section XII must forever set an end to such a doubt.

A more explicit expression as to the rights and duties of members in this regard it would be difficult to conceive. And this is not "canon law" upon which the complainant relies. It is a plain, direct, civil contract between a corporation, duly chartered by the Legislature of the State of New Jersey to make such regulations as it may deem proper for the admission and control of its members, and one of its members admitted in conformity with the prescribed regulations. There is no doubt that these regulations were in force when Father Wirth joined this New Jersey corporation, and were in force at the date of the trial long after Father Wirth's death (90,

91, 93). It is conceded that Father Wirth became a member of the Order in 1887 and remained as such till his death (328, 329). There can be no doubt therefore that he who was a member of this corporation for the period of fourteen years, from 1887 to 1901 was bound by the language of this Section XII which was a part of his contract with the Order.

What then was that contract? Briefly it may be summarized as follows:

Father Wirth on his part agreed to devote his life to religious and educational work, either in the Abbey of St. Mary's in Newark, or by the permission of its Abbot to engage in similar work elsewhere, such permission being in every instance "*ad tempus*," and he being susceptible of recall to the Abbey in Newark. He agreed not to attempt or to acquire, or hold property for his own personal use, and to turn over to the Abbey for its charitable uses, any surplus of income he might in any way receive over such sums as should be necessary for his personal support and sustenance when located elsewhere than at the Abbey. He agreed, more generally, to adhere to and be bound by the rules of the Benedictine Order to which he had promised obedience, and to preserve his allegiance to the said Order and his vow of chastity.

The Order of St. Benedict of New Jersey, on its part agreed to support and maintain him throughout his life, or as long as he continued to be a member thereof, either in health or sickness, in the Abbey or elsewhere, should he ask permission to go or be sent to work outside the Abbey. If the place where he should be sent was within the jurisdiction of the Abbey of St. Mary, he was to account regularly for any moneys received as salary or otherwise. If without the jurisdiction then to the Bishop of the diocese where he was situated. If he did not receive sufficient funds for his support from the place where he was sent then the Abbey would send him what was needed (131).

In other words, the Order of St. Benedict of New Jersey assumed all responsibility for his care, support and maintenance both in sickness and health wherever he might be stationed as long as he continued his membership therein.

We come now to the question of whether or not this contract was executed.

First, as to the Order of St. Benedict of New Jersey. We do not imagine that there can be any attempt to contend that the contract was not fully and completely performed by that corporation. The Order on its part has certainly fulfilled all its obligations to Father Wirth. It had taken him into membership in 1887 when he was sick and suffering. He sought the shelter and care of the Abbey in Newark April 3, 1887 (176) before he had transferred his stability to and had become a member of the New Jersey Order, which did not occur till May 15, 1887 (84, 85); and he was for two years thereafter incapacitated for outside work and taken care of by members of the Order (94, 95, 264). From 1889, when he returned to his pastorate in Newark, till 1897, he continually accounted to the Abbot for the moneys received as salary from that church (94, 165); it was by the express permission of the Abbot of the Order in New Jersey that he was allowed to take up the work in Springfield, Minn. (95, 103); he was still responsible to Abbot Hilary there except for the management of the parish matters in which he was responsible to Archbishop Ireland (197); and he was liable to be recalled to Newark at any time (131); while the Order sent him no money during his stay Minnesota it was none the less responsible for his support and maintenance as his membership was not severed by distance, and had funds been necessary they would have been sent to him (131). As soon as the Order was informed by telegraph of Father Wirth's last sickness, instructions were immediately given to the Abbot of St. John's, Min-

nesota, to take charge of all Father Wirth's effects and of his funeral (95, 96).

The funeral expenses were paid by the Abbot Engel of St. John's Abbey in accordance with Abbot Hilary Pfraengle's instructions out of moneys found in Wirth's possession, the balance of which together with his personal effects were remitted to the Order of St. Benedict in New Jersey (96, 162, 167). There remains nothing which the Order of St. Benedict could do to carry out the contract on its part which it did not do. Nor do we apprehend that it will be seriously contended as to the Order of St. Benedict of New Jersey that the contract between that corporation and Augustine Wirth was not fully and entirely executed.

As to Father Wirth, however, it seems to be the opinion of the learned Circuit Court of Appeals that the contract remained executory at the time of his death. As far as we are advised by the decision of the learned Circuit Court of Appeals the sole fact upon which this opinion is based appears to be the fact that Father Wirth retained certain sums of money which he derived from the proceeds of the religious works which he was engaged in translating, compiling and publishing.

The argument advanced would seem to be that the contract with Father Wirth provided that he should hold no property to his own use; that he continued in possession of certain funds at the time of his death which should have been turned over to the Order of St. Benedict of New Jersey; and that because such funds had not been turned over to the said Order the contract was executory only as to Wirth and the title to said funds passed to his administrator.

The answer to this is of course that Father Wirth had specific permission to retain these funds (149, 173, 177) to dispose of for charitable purposes only with the consent of his superiors (149, 165, 166). It is further shown that he was engaged in building a school at Springfield, Minn., at the time of his

death (153); also that he had accounted for the other funds in his possession showing the receipts and expenditures of the Springfield parish up to January 1, 1901, the last date when an annual official report was due before his death which was in December of that year (238, 239).

Now as to this permission to hold these funds there is no doubt it was actually given to Father Wirth. The learned judge of the Circuit Court as to this stated: "I find, however, as a fact that the "permission was to use the money for charitable "purposes only. The evidence does not justify a "finding that there was a permission that the "money which he received from the sale of his "books should belong to him as an individual. Such "a permission would be entirely inconsistent with "the vow of poverty, the fundamental idea of the "Order, and it would be beyond the power of the "Abbot to give. There is nothing in the charter, "constitution or by-laws which authorizes the Abbot "to single out one of the monks and say to him "that all or a part of what he earned might belong "to himself. The effect of the permission that was "given was to make Wirth the agent of the Order "in disposing of the money in charity, which "agency terminated at his death. Whatever he "had thus disposed of the complainant would be "estopped from recovering now. But the permis-"sion falls far short of an agreement that whatever "he left should after his death belong to his heirs "and not to the Order" (179 Fed., 137; Printed Record 305, 306).

We respectfully submit that this reasoning of the learned Circuit Court is strictly in accordance with the facts and situation disclosed by the record.

The learned Circuit Court of Appeals has arrived, however, at a diametrically opposite conclusion. It says: "We are satisfied beyond any doubt that "Wirth had permission of both Abbots to receive "the income from his books and retain it as his "own property, and that the Rule upon which the

"complainant relies and which is a part of its "charter permits this" (334).

It is somewhat difficult to understand why the learned Circuit Court of Appeals makes no mention at this point of Section XII of the Complainant's constitution, which directly forbids any such acquisition of property, and provides that each member must hold all his earnings to the use of the Order of St. Benedict of New Jersey. And it would seem that the learned Circuit Court of Appeals has overlooked the fact that it is the civil corporation of the Order of St. Benedict of New Jersey that is instigating this proceeding and not the religious society of the same name.

But whether the opinion of the Circuit Court or that of the Circuit Court of Appeals that the contract on the part of Augustin Wirth is executed or executory be correct makes no difference upon this inquiry.

If the Circuit Court be correct, and we respectfully submit that it is, nothing remained for Wirth to do. He held a certain fund in trust to be used for charitable purposes; what he had not so disbursed, at his death became the property of the *cestui que trust*. What remained for him to do as far as this fund was concerned when he was so holding it with the permission of the order?

If on the other hand the contention of the learned Circuit Court of Appeals be adopted, what becomes of the executory contract theory? The only basis upon which it is sought to hold that the contract was executory is because the property in controversy had not been conveyed to the complainant (333). But it is conceded that this property was held by Wirth with the express permission of the Order: and the Circuit Court of Appeals held further that such permission included the right to hold it as his own personal property (334). Now if that be true he certainly was not obligated under the contract to turn the property over to the Order. And if he

was not so obligated the contract in this respect was not executory.

It is nowhere contended that the contract was not fulfilled in all other respects by Father Wirth. He remained a member of the Order of St. Benedict of New Jersey until his death and was engaged up to the end in the religious and charitable works to which he had consecrated his life. Despite the slight disagreements between him and the Abbot of St. Mary's and despite the reprimand of the Abbot Primate he did not separate himself nor attempt to separate himself from the Order, and died within it. As was said by the learned judge of the Circuit Court, and in this respect he is not disputed by the learned Circuit Court of Appeals:

"We have not here a case where a member has "been expelled, or has voluntarily left the Order "and is attempting to recover something that he has "paid in; nor is it a case where a member has vol- "untarily left the Order, where his relations with "it have been entirely terminated, and notwith- "standing this termination the Order is attempting "to compel the member to account for his earnings "received after such separation. On the contrary, "we have here a case where Wirth lived and died a "member of the Order. We have here a case where "the Order and Wirth both considered the contract "binding upon them up to the time of the death of "the latter. * * * So far as the performance "of this contract is concerned, this suit presents "the case of an executed and not of an executory "contract" (299).

We respectfully submit that this statement is a correct statement of the law of this case on this head.

And we venture to further submit that on this question the learned Circuit Court of Appeals has nullified the force of its own argument by holding, first: that the contract was not fully performed because Wirth had not transferred to the Order this

property which he had permission to keep, but which, seemingly, according to the argument by which they endeavor to declare the contract executory as to Father Wirth, he was under obligation to so transfer (333); second, by practically admitting that "if "Wirth in his lifetime had conveyed this property "to the complainant that he could not thereafter "have recovered it back, and that his legal represen- "tatives could not after his death" (333); and third, that this permission entitled him to retain this property as his own, which is tantamount to saying that if the Order of St. Benedict had in any way gotten possession of any of this property before his death he could have recovered it back and, as a natural corollary, his representatives could have had similar rights after his death.

We maintain, therefore, that the learned Circuit Court of Appeals entirely failed to demonstrate that the contract between the Order of St. Benedict of New Jersey, and Augustin Wirth was not fully executed as to its performance by both sides, and in that respect the decision of said Court is erroneous.

To put the case in a nutshell, by this contract Father Wirth assumed with respect to the Order of St. Benedict a certain *status* by reason of which he assumed certain obligations. Except as he was released from any part of those obligations by his superiors in so far as they had the power, he remained bound thereby as long as he continued in the said *status*.

As we shall show in our next point he had the right and power to abandon that *status* at any time he saw fit. He chose to remain in that *status* up to his death and his representatives now cannot assert any rights which he did not have in that *status* and which could only accrue to him upon its abandonment—a step he chose never to take.

POINT TWO.

The contract was not void as against public policy.

In the discussion of this subject the learned Circuit Court of Appeals seems to have lost sight entirely of the fact to which we have already called attention in the preceding point, *i e.*, that the complainant in this suit is not the canonical or ecclesiastical society known as the Society of St. Benedict, but is the corporation duly chartered by the Legislature of New Jersey known as the Order of St. Benedict of New Jersey of which concededly Augustin Wirth became a member in 1887 and in which he retained his membership up to the date of his death in December, 1901.

That this is evident is apparent from the language of the opinion itself at page 329 of the record.

"The only question involved is that of the legal "ownership of the specific property described in the "bill, as between the complainant and the defend- "ant, and that question is not to be determined by "canon, or church law, but by the law of the land. "The canon law, however, or the law of the Church "of Rome, as between Father Wirth and the Church "or the Benedictine Order may have required of "him during his lifetime strict adherence to his "vows and observance of the Rule; but it cannot "be seriously contended that either the vows or the "Rule or both together, can have any effect what- "ever upon the legal right of Wirth to acquire and "hold property in his own right" (329).

We might be disposed to controvert this statement if it were essential to our case by showing that both said vows and the Rule have been incorporated into the constitution of the complainant and would therefore seem to have, by virtue of such adoption, a

direct bearing on Augustin Wirth's right to hold property in his own right.

However, that is not essential to our case for the constitution of the Order of St. Benedict of New Jersey (Section XII) contains a specific renunciation by each member of any right to hold property in his own name; and a direct agreement to transfer all his earnings and other property except such as may be necessary for his own sustenance to the legal title of the Order (92). The opinion of the Circuit Court of Appeals, however, goes on to state:

"The most that can rightly be claimed for these "vows, in connection with the Rule is, that they "are evidence of a contract of a civil nature be- "tween Wirth and the Order whereby he agreed to "devote his time and labor thereafter, during the "remainder of his life, to the exclusive benefit of "the Society or Order, and to convey to it all prop- "erty that he then owned or might thereafter ac- "quire in consideration of the agreement upon the "part of the Order to suitably support and care for "him in health and in sickness *while a member of* "*the Order*, and complainant predicates its right of "action against the defendant upon *such a con-* "*tract so* made" (329).

Here, again, all reference to the language of Section XII of Complainant's Constitution is omitted, and the impression is sought to be created that any "contract of a civil nature" between Wirth and the complainant is dependent solely upon his original vows taken at St. Vincent's Abbey and the Rule of St. Benedict, without the slightest regard to the actual legal and civil contract created between Wirth and the Order of St. Benedict of New Jersey when he became a member thereof in 1887 and thus bound himself to the observance of its rules and regulations as evidenced by its Constitution and By-Laws.

And the impression to which we have just referred

is sought to be strengthened by the next sentence, wherein it is stated:

"That the vows of Wirth and that portion of the "Rule in evidence are in effect a contract as be- "tween him and the Order is not seriouly disputed "by the defendant; but its validity is challenged "by him as being inconsistent with the 'funda- "'mental principles of American institutions as ex- "'pressed in their constitutions'" (329, 330).

Your Honors will again note that all reference to Section XII of complainant's Constitution, which is certainly a vital and most important feature in the contract between Wirth and the complainant, is omitted and the contract which the Court thus undertakes to construe is only a portion of the contract between the parties. And further it will be noted that the learned Circuit Court of Appeals has seemed to focus its attention upon the ancient and canonical features of the relationship between Father Augustin Wirth and the religious society known as the Society of St. Benedict, with apparently slight consideration of the actual civil relationship between Augustin Wirth, a regularly constituted member of the New Jersey corporation known as the Order of St. Benedict of New Jersey, and that corporation itself.

The objections to the contract considered by the learned Circuit Court of Appeals as being against public policy seem to narrow down when carefully examined to two:

FIRST: It is urged that the individual may never sever himself from the Order except by special dispensation of the Pope, and hence he may be bound for life in temporal as well as spiritual affairs if the Pope refuse such dispensation.

SECOND: It is the natural and inherent right of every person in this country to acquire and hold property in his own name and the State is interested

that this right should not be abridged either by the State or any person, individual or corporate, without due process of law (330, 331).

The first objection arises from a very patent misconception of the meaning of certain testimony given by Abbot Hilary Pfraengle. The Reverend Abbot being questioned as to the manner in which a member of the Order could leave voluntarily, stated (130) that he could only be released from membership by dispensation which is called secularization,—which would always leave him open a livelihood from some other source (130). Later on he defined a secular priest as "one that works for "souls in the congregation under the direction and "care of the bishop of the diocese" (146). Again he testified that a member of the Order could only cease to be such by secularization or expulsion (167).

Still later in the record, when he was being cross-examined at length as to the manner in which a member could leave the Order, he testified that this could be accomplished by secularization or expulsion. In the testimony which followed it became immediately apparent that his meaning was, that a member could only be released from his vows in the Order and retain his standing otherwise as a priest by secularization (179, 180). If, however, he should join the Masonic Order or commit a crime, or join the Episcopal church or any other denomination and remained in that state he could be expelled (180, 181).

As Abbot Hilary stated, if a member should join a secret society that would be called a voluntary leaving of the Order, since that would result in expulsion.

With this testimony in mind the language of Section XI is perfectly understandable and controlling, to wit:

"Membership is lost at once--

"1. By being dismissed according to the dis-"ciplinary Statutes of the Order of St. Benedict, "&c.

" 2. By voluntary leaving the Order for any pur-
" pose whatsoever.

" 3. By joining any other order or secret society
" or any other religious denominations."

It is perfectly evident that Abbot Hilary's testimony related solely to the formal manner in which a member's name would be dropped from the rolls.

If by dispensation, he could be secularized and retain his standing as a priest.

If he deserted the Order and remained contumacious, he would be expelled.

It is further evident that members have the right to leave at any time from Section XII, by which they agree not to claim any more than their decent support "for the time for which they are " members of the Charter of the Order of St. Bene-
" dict of New Jersey and no further," which is evidently a warning to them that they need expect no further support and maintenance if they desert.

However, we do not think this learned Court will be seriously impressed with the contention that members may not leave the Order at their will. The language of their constitution too evidently contemplates that right, and Abbot Hilary's testimony makes it perfectly clear how it may be exercised.

It is evident that the learned Circuit Court of Appeals, as we have already pointed out, based its argument on this head solely on the Canon Law. The question was carefully considered by the learned Circuit Court:

" In this case we are not concerned with the ques-
" tion as to whether a person once a member of the
" Order of St. Benedict can ever be relieved from
" the vow which he took on becoming a member.
" It used to be said that not even the Pope himself
" could give him dispensation. But this idea has
" been for ages abandoned, and that he can by the
" church be relieved from the vows is well settled.

"The witnesses on canonical law say that he could "cease to be a member by secularization or expul- "sion, and that this takes place only with the con- "sent of the Order. It is thus seen that a person "can be relived from his vows even by the Canon "Law. But the question is, as has been said before, "not what were Wirth's relations to the Order of "St. Benedict, but what were his relations to the "Order of St. Benedict of New Jersey? It is dis- "tinctly provided in the constitution of the com- "plainant that a member may voluntarily leave the "Order. Section XI of the Constitution is as fol- "lows: 'Membership is lost at once:

"'2. By voluntarily leaving the Order for any "purpose whatsoever.'

"Wirth could at any time have separated from "the complainant. If he had done so the com- "plainant would have had no right to his future "earnings. It cannot be said then that the con- "tract entered into between the parties when "Wirth became a member of the complainant "forever deprived him of the right of acquiring "property and forever incapacitated him from own- "ing property. He could resume his right to ac- "quire property for himself at any time he chose. "With this right of voluntary withdrawal what "ground can there be for saying that the contract "of 1887 was against public policy. On principle "it is very clear that it cannot be said to be so and "and it is equally so on authority. The State of "New Jersey having incorporated this Society one "of the articles of which states that only members "of the Order of St. Benedict can become members "thereof, it cannot be said that such an organiza- "tion as the complainant is contrary to the public "policy of the State of New Jersey. The legisla- "ture must have known what the religious Order "of St. Benedict was when it incorporated the Order "of St. Benedict of New Jersey" (179 Fed., 137; Record, pp. 300-301).

It will be seen that conceded, as it must be, that Wirth had the right of withdrawal from the Order at any time, the second objection raised by the learned Circuit Court of Appeals that the contract between him and the Order forever deprived him of the right to acquire and hold property falls also to the ground. Nor can this contract be said to be on either of the two grounds alleged, to-wit enforced continuous membership and deprivation of property rights, void as against public policy since as has been shown, neither of those grounds can be sustained.

It may be proper at this point briefly to consider what is this "Public Policy" which the Circuit Court of Appeals has sought to invoke to invalidate this contract. And by "this contract" we mean the contract of 1887 made between Father Wirth and the Order of St. Benedict of New Jersey at the time he joined the said Order in New Jersey.

"By 'Public Policy' is intended that principle "of the law which holds that no subject can law- "fully do that which has a tendency to be injurious "to the public or against the public good, which "may be termed the 'Policy of the Law' or "'Public Policy in relation to the administration "'of the law'" (Egerton *vs.* Earl, 4 H. L. Cases 1, 255).

The above definition is that most widely quoted and adopted by text-writers and in judicial decisions throughout the various states.

The learned Supreme Court of the United States has thus defined the term:

"Public policy is variable; the very reverse of "that which is the policy of the public at one time "may become public policy at another; hence, no "fixed rule can be given by which to determine what "is public policy. The authorities all agree that "a contract is not void as against public policy "unless it is injurious to the interests of the public

" or contravenes some established interest of " society."

Hartford Fire Ins. Co. *vs.* C. M. & St. P. Ry. Co., 175 U. S., 91.

As to the application of the public policy doctrine we beg leave to quote the following:

" Judicial tribunals hold themselves bound to the " observance of rules of extreme caution when in- " voked to declare a transaction void on grounds of " public policy; and prejudice to the public interest " must clearly appear before a Court would be war- " ranted in pronouncing a transaction void on this " account. It is said that the power of Courts to " declare a contract void for being in contravention " of sound public policy is a very delicate and unde- " fined power and like the power to declare a statute " unconstitutional, should only be exercised in cases " free from doubt."

Smith *vs.* Du Bose, 78 Ga., 413; 3 S. E. 309, 314.

It is certainly by no means free from doubt that this contract is " injurious to the public, or against " the public good," or that " it contravenes some " established interest of society," or that " prejudice " to the public interest " clearly appears therefrom. And this is especially true when it is remembered that the purposes of the Order and of Augustin Wirth in joining the same are a life-long, unselfish consecration to the advancement of educational, charitable and religious works. We can do no better than quote again from the opinion of the learned Judge of the Circuit Court on this head.

" To me the astounding thing is, not that it " should be claimed that such a contract executed " as this was, was valid, but that it should be " claimed that it was void. It would seem to me " contrary to all sense of justice to say, after a per- " son had joined such an Order as this, had unsel-

" fishly devoted his life to the charitable purposes " of its organization, had worked continually that " the money derived from his labors might be used " by the Society for such purposes, and after it had " been so used by it and after the man had died in " full communion with the Order, that his heirs, his " nephews and nieces could maintain an action to " recover from the Order the value of the services " of their ancestor. Yet, that must be the result if " the contract made between the orator and Wirth " was contrary to public policy. That the purposes " of the Order are not contrary to public policy can " not for a moment be doubted. To doubt upon " that point would be to doubt the doctrines of the " Christian religion and the teachings of the mor- " alists of all ages " (300).

But going still further on this question of public policy with especial relation to the public policy of the State of New Jersey under whose laws this corporation was formed by an act of its Legislature and where this contract was made, we find the following authorities as to how it may be determined what is the public policy of that State:

" In determining the question what is the public " policy of a State and what is contrary to it, the " Court cannot look at general considerations of the " supposed public interests and policy of a State " beyond what its constitution and laws and judi- " cial decisions make known. The Court is not at " liberty to travel out of the record in order to ascer- " tain what is against the policy of a State."

Vidal *vs.* Girard's Exrs., 43 U. S. (2 How.), 127, 197.

Again:

" The policy of a State or nation must be deter- " mined by its constitution, laws and judicial deci- " sions, not by the varying opinion of laymen, law-

"yers, or judges, as to the demands or interests of "the public."

Hartford Fire Ins. Co. *vs.* C. M. & St. P. Ry. Co., 70 Fed., 201, 202.

See also Swann *vs.* Swann, 21 Fed., 299, 301.

We find then, so far as the public policy of the State of New Jersey is concerned, that we have in the act incorporating The Order of St. Benedict of New Jersey from members of " The Society called " the Order of St. Benedict, being a society of re- " ligious men living in community and devoted to " charitable works and the education of youth, " &c " an actual expression of approval by the Legislature of the State in the objects and purposes of the Order and by this charter the said Order was directly authorized " to make such by-laws " for their government and for the admission of " members into the corporation as they shall deem " proper."

As was said by the learned trial Judge of the Circuit Court " the Legislature must have known " what the religious Order of St. Benedict was when " it incorporated The Order of St. Benedict of New " Jersey " (301). And as it used the expression " a " society of religious men living in community " it no doubt fully understood their rules as to personal ownership of property.

However, we are not left to the reasoning which may be developed from the facts and circumstances of the case at bar alone, since there are other and similar cases which have been before the courts in which the questions here raised have been adjudicated.

The leading case in this line of authorities is that of Goesele *vs.* Bimeler, 55 U. S. (14 How.), 589. The facts are so analogous in every esssential feature to the case now before this Honorable Court that the

decision has a most important bearing on the questions now under discussion.

A society known as the Separatists emigrated to the United States from the Kingdom of Wurtemberg, Germany, where they had been much persecuted on account of their religious beliefs. They subsequently formed themselves into a community and acquired a tract of land in the State of Ohio. They adopted two constitutions and afterwards obtained an act of incorporation. The articles of association (or constitutions) which each one signed, contained an absolute renunciation of all rights of individual property, and this renunciation was upon the consideration that the society would support the individual thus signing, and maintain him in sickness and in health. This was considered by those signing the articles an adequate compensation for all property transferred to the common stock and for all labor thereafter to be performed by them for the advancement of the common welfare.

Certain persons claiming to be the rightful heirs of one of the members who had signed these articles, subsequently brought an action in partition against the society for what they claimed to be his share of the property.

The United States Supreme Court held that no right of property had descended to these persons as heirs; that there could be no legal objection to the formation of such a community nor was it in any way subversive of public morals or against public policy; and that it could not be considered a forfeiture of individual rights for the community to succeed to the share of the decedent, since the original proceeding was entirely a matter of voluntary contract.

The Court said at page 604:

" He then signed the first articles, which, like the " amended articles, renounced individual ownership " of property, and an agreement was made to labor " for the community, in common with others, for " their comfortable maintenance.

" All individual right of property became merged " in the general right of the association. He had " no individual right, and could transmit none to " his heirs. It is strange that the complainants " should ask a partition through their ancestor, " when, by the terms of his contract, he could have " no divisible interest. They who now enjoy the " property, enjoy it under his express con- " tract." * * *

" As a general rule, Chancery may not enforce a " forfeiture, but will it relieve an individual from " his contract, entered into fairly, and for a valu- " able consideration? What is there in either of " these articles that is contrary to good morals or " that is opposed to the policy of the laws? An " association of individuals is formed under a reli- " gious influence, who are in a destitute condition, " having little to rely on for their support but their " industry; and they agree to labor in common for " the good of the society, and a common mainte- " nance for each individual, and whatever shall be " acquired beyond this shall go to the common stock. " This contract provides for every member of the " community, in sickness and in health, and under " whatsoever misfortune may occur. And this is " equal to the independence and comforts ordinarily " enjoyed.

" The ancestor of the complainants entered into " the contract fairly and with a full understanding " of its conditions. The consideration of his com- " fortable maintenance, under all circumstances, " was deemed by him an adequate compensation for " his labor and property contributed to the common " stock.

" The complainants speak of the interest of their " ancestor in the real and personal estate owned by " the association, and their counsel contend that the " articles did not divest him of either, but both de- " scended to his heirs at law at his death.

" This argument does not seem to comprehend " the principles of the association. Land and other

" property were to be acquired by the members, but " they were not to be vested with the fee of the " land. While they remained in the society, under " its general regulations, the products of their " labor on the land and otherwise were applied, as " far as necessary to their support. Beyond this " they were to have no interest in the land or in the " personal property. * * * This was a benevo- " lent scheme, and from its character might prop- " erly be denominated a charity. But from the " nature of the association and the object to be at- " tained, it is clear the individual members could " have no rights to the property except its use un- " der the restrictions imposed by the articles. The " whole policy of the association was founded on a " principle which excluded individual ownership. " Such an ownership would defeat the great object " in view, by necessarily giving to the association " a temporary character. If the interests of its " members could be transferred or pass by descent, " the maintenance of the community would be im- " possible. In the natural course of things the " ownership of the property in a few years, by " transfer and descent, would pass out of the com- " munity into the hands of strangers, and thereby " defeat the object in view.

" By disclaiming all individual ownership of the " property acquired by their labor, for the benefits " secured by the articles, the members give dura- " bility to the fund accumulated and to the benevo- " lent purposes to which it is applied. No legal " objection is perceived to such a partnership."

The same organization was before the Court of Ohio in the case of Goesele *vs.* The Separatists Society of Zoar, 13 Ohio St., 144. The contract was there held binding against one who having withdrawn sought a division of the property and an assignment to herself of her share.

The case of Schreiber *vs.* Rapp, 5 Watts (Penna.), 351; s. c., 30 Am. Dec., 327, had to do with what was

known as the Harmony Society in that State. In that case it was held that an association to which each of the members surrendered his property into one common stock for the mutual benefit of all during their joint lives, with the right of survivorship, reserving to each the privilege of seceding at any time during his life is not prohibited by law. And it was further held that the right of secession under such circumstances is not transmissible to the personal representative of a party to such agreement so as to enable him to recover the property of his intestate thus put into the common stock.

In the agreement between the individual and the association in this case there was the same provision that the individual should receive full maintenance and support during his life.

The Court said at page 360: "An association for "the purposes expressed is prohibited neither by "statute or common law, and it is clear that but "for the amount of its income this society would "be entitled to a charter by our statutes for self-"incorporation. It may be true that the business "and pursuits of the present day are incompatible "with the customs of the primitive Christians; but "that is a matter for the consideration of those "who propose to live in conformity to them. Our "laws presume not to meddle with spiritualities, and "religious societies are regarded by them but with "an eye to their temporal consequences. It has "not been pretended that this society is detrimental "to the public or its neighbors. It is an ecclesiasti-"cal community, performing with alacrity its "duties to the laws, rendering unto Cæsar the "things that are Cæsar's, and fashioning its mu-"nicipal rules of property and government after "the models of those Christian societies that ex-"isted in the days of the Apostles. Its most pecu-"liar features are submission to the will of its "founder, and an equal participation of property "brought in the common stock by individuals, or "produced by the labor of the whole."

In the case of Burt *vs.* Oneida Community, 137 N. Y , 346, the Court stated the character of the society to be as follows, on page 353: "Necessarily the "basic proposition of such a community was the "absolute and complete surrender of the separate "and individual rights of property of the persons "entering it; the abandonment of all purely selfish "pursuits, and the investiture of the title to their "property and the fruits of their industry in the "common body, from which they could not afterwards be severed or withdrawn, except by unanimous consent. It was fashioned altogether according to the Pentecostal ideal that all who believed should be together and have all things "common."

The Court then said, page 354:

"These were the main features of the organization to which the plaintiff voluntarily became a "party. It is not shown or found that he was induced to enroll himself among its members by any "fraud or duress; and in viewing it solely as a "business undertaking, it was not prohibited by "any statute or in contravention of any law regulating the possession, ownership or tenure of property. It imposed no unlawful restraint upon the "alienation of property, for the title to its real "estate could be conveyed at any time by the united "action of its members if they so willed it. It was "a joint holding of property by the adult members "of the community with this qualification, that "upon the death or withdrawal of a member no "share or interest therein passed to him or his personal representatives, but they who survived or "remained continued to hold jointly the entire "property *in solidum*."

In the case of Waite *vs.* Merrill, 4 Me., 102; s. c., 16 Am. Dec., 238, the plaintiff withdrew from the community of Shakers, and attempted to recover the value of his services while such a member on the

ground that his contract of membership was void. The Court said, on page 118:

"It is said that it is void, because it deprived the "plaintiff of the constitutional power of acquiring, "possessing and protecting property: The answer "to this objection is, that the convention only "changed the mode in which he chose to exercise "and enjoy this right or power; he preferred that "that the avails of his industry should be placed in "the common fund bank of the society, and to de- "rive his maintenance from the daily dividends "which he was sure to receive. If this is a valid "objection, it certainly furnishes a new argument "against banks, and is applicable also to partner- "ships of one description as well as another.

"It is said that the covenant or contract is con- "trary to the genius and principles of a free gov- "ernment, and therefore void." * * *

"In support of this objection, it is contended "that the covenant is a contract for perpetual "service and surrender of liberty. Without paus- "ing to enquire whether a man may not legally "contract with another to serve him for ten years "as well as one, receiving an acceptable compensa- "tion for his services, we would observe that by "the very terms of the fourth and fifth articles, a "secession of members from the society is contem- "plated, and its consequences guarded against in "the fifth by covenants never to make any claim "for their services against the society."

And again, on page 120:

"Again it is urged that the covenant is void, be- "cause its consideration is illegal, that it is against "good morals and the policy of the law. We ap- "prehend that these objections cannot have any "foundation in the covenant itself; for that is silent "as to many particulars and peculiarities which the "counsel for the plaintiff deems objectionable. The "covenant only settles certain principles as to the

"admission of members; community of interest; "mode of management and support; acquisition "and use of the property; stipulations in respect to "services and claims; professions of a general na- "ture as to the faith of the Society, and a solemn "renewal of a former covenant and appointment "of certain officers." * * * "Now, what is "there illegal in its consideration, or wherein is it "against good morals or the policy of the law? It "does not contain a fact or a principle which an "honest man ought to condemn; but it does con- "tain some provisions which all men ought to ap- "prove; it distinctly inculcates the duty of honest "industry, contentment with competency, and "charity to the poor and suffering."

The case of Gass & Banta *vs.* Wilhite, 2 Dana (Ky.), 170, had to do with another community of Shakers. It was held that seceding members had no right in or to the community property. The Court said, on page 180:

"So long as piety is recognised by com- "mon assent, and by the Legislature, as a "valuable constituent in the character of our "citizens, the general law must foster and encourage "what tends to promote it. In legal estimation, it "must be viewed as what is not only estimable "in itself, but as an appurtenance to the characters "of individul citizens, of great value to society, for "its tendency to promote the general weal of the "whole community. By the common assent of men "in all time it seems to be agreed that societies or "communities of individuals having its cultivation "for their principal object, are necessary, or at least "proper, auxiliaries to its support and propagation."

Schwartz *vs.* Duss, 93 Fed., 529, decided by the Circuit Court for the Western District of Pennsylvania, involved the Harmony Society, the same organization which appeared in Schreiber *vs.* Rapp

(*supra*) and in Baker *vs.* Nachtrieb, 19 How., 126. In Schwartz *vs.* Duss, the Court said, on page 530:

"In view of the decision of the Supreme Court of "Pennsylvania in Schreiber *vs.* Rapp, 5 Watts, 350, "and the decisions of the Supreme Court of the "United States in Goesele *vs.* Bimeler, 14 How., "589, and Baker *vs.* Nachtrieb, 19 How., 126, it is "clear that the above recited articles of agreement "are valid contracts, and that thereunder, upon the "death of a member of the Society in fellowship, "no claim enforceable against the Society or its "property passes to his heirs or personal represent-"atives, and that since 1836 no member voluntarily "withdrawing from the Society could acquire any "such claim."

And speaking of persons who continued in the society until their death, as did Wirth in this case, the Court also said on the same page:

"The other persons through whom the plaintiffs "claimed remained with the society and died in fel-"lowship. They thus received and enjoyed all the "benefits secured to them by the recited articles of "agreement, and therefore no rights, enforceable "against the society, passed from them to their "heirs, or personal representatives."

The decree in that case was affirmed by the Circuit Court of Appeals of the Third Circuit, 103 Fed., 567, and by the Supreme Court in 187 U. S., 8.

The Supreme Court in affirming the judgment, said on page 26:

"That agreement was the affirmation and the "continuation of the prior agreements, and they "were held not to be offensive to the public policy "of Pennsylvania, by the Supreme Court of that "State in Schreiber *vs.* Rapp, 5 Watts, 351. The "trial court in that case had instructed the jury "that 'there is nothing in the articles of associa-"'tion (those of 1805, 1821, 1826) given in evi-

" ' dence that renders the agreement unlawful or
" ' void; nothing in them inconsistent with constitu-
' ' tional rights, normal precepts, or public policy.' "
The Supreme Court further observed that the point made against the articles as being against public policy was attended with no difficulty and Chief Justice Gibson said for the Court: " ' An associa-
" ' tion for the purpose expressed is prohibited
" ' neither by statute nor the common law. And
' ' it did not occur to this Court in Baker, *et al.*, *vs.*
" ' Nachtrieb, 19 How., 126, to treat them as in-
" ' valid contracts. See also Goesele *vs.* Bimeler,
" ' *et al.*, 14 How., 589; Speidel *vs.* Henrici, 120 U.
" ' S., 377.' "

It will thus be seen that the doctrine of the Goesele *vs.* Bimeler case which, as has been already set forth, is the leading authority on the validity of such contracts as not against public policy, has been reasserted and affirmed as recently as 187 United States, 8.

We are aware that the learned Circuit Court of Appeals referred to the cases above cited in its opinion and stated that they were not in point. It was sought to distinguish them on the sole ground that the contracts therein referred to were all of them executed, while the contract now under discussion was executory. We have already demonstrated that the Wirth contract was executed as to both parties, so this distinction is not accurate. But even if it were executory, we respectfully submit that the cases above cited are absolutely controlling upon the issue as to whether or not such contracts are void as against public policy and are distinctly in point on that issue.

Many of the legal questions raised here were at issue in the case of Benziger *vs.* Steinhauser, 154 Fed., 151, which arose from the same transaction involved in this suit. While it is true that that decision was upon demurrer and it was held only that upon the facts alleged a cause of action was

stated in the complainant's cross-bill therein, it is nevertheless true that the allegations of that bill were in substance identical with those of the complainant's bill herein. And the points of law raised by the demurrer were in effect the same as those raised here as will be seen from the opinion of Judge Ray, 154 Fed., 151, which cites every one of the cases last above referred to as authority for the proposition that they "seem to sustain the rights "of the corporation to the property and money in "question."

The learned Circuit Court of Appeals has cited as authority for the contention that Wirth's contract of 1887 with the Order of St. Benedict of New Jersey is against public policy, the case of

Baltimore Humane Society *vs.* Pierce,
100 Md., 520.

The contract in that case was not made as might be imagined from the citation contained in the opinion of the learned Circuit Court of Appeals with Elisha Pierce, the inmate of the Home, who subsequently died and whose son claimed a sum of money left to him subsequent to the admission of said Pierce to the Home. The contract was only signed by this son and another person acting as trustees. It contained a clause in addition to that cited in the extract quoted by the learned Circuit Court of Appeals, which created certain officers of the Home as practically trustees and executors of what seemed to be an attempt to make a will for the said Elisha Pierce, the said clause ending in a formal attestation clause. As has been said above this remarkable instrument was not signed by Elisha Pierce. The matter first came before the equity side of the Court in 99 Md., 532. In that case it was shown that the alleged contract was also not signed by the Home, nor did it profess to impose any obligation upon the said Home for its execution. It was therefore held lacking in mutuality and void.

In the case in 100 Md., where the plaintiff relied upon a simple contract, the Court held that there was no signature to bind Elisha Pierce. Also that as the institution had agreed, if it had agreed to anything, to care for the said Pierce for a definite sum though small, that sum was none the less agreed upon and it could not claim more.

It needs no comment to show how absolutely lacking in application this case is to the facts of the case at bar.

The cases of Aspinwall Mfg. Co. *vs.* Gill, 32 Fed., 697, and Hershey *vs* Clark, 35 Ark., 17, are upon contracts so entirely executory in character as to be absolutely inapplicable to the case at bar.

It is therefore confidently submitted both upon principle and authority that the contract of 1887 between Father Augustin Wirth and the Order of St. Benedict of New Jersey is not invalid or void as against public policy, and that the learned Circuit Court of Appeals erred in so holding.

POINT THREE.

The complainant has established by clear and satisfactory evidence that the property in the possession of Augustin Wirth at the time of his death was held by him in trust for the Order of St. Benedict of New Jersey.

This proposition has already been so exhaustively discussed and carefully demonstrated in the development of the two preceding points as to need little further specific discussion. By way of recapitulation, however, it may be proper to state briefly the various elements which combine to sustain this contention.

FIRST: Augustin Wirth entered in the year 1887 into a contract with the corporation known as the Order of St. Benedict of New Jersey by which he bound himself as long as he remained a member of said corporation to hold his individual earnings as a part of the common property of the Order, the balance of which over the amount necessary for his support was to serve in carrying out the charitable objects of the Order; he further agreed that he would not at any time claim more than his decent support as long as he remained a member of the Order; and he also pledged himself to have all property which he might then or thereafter hold in his own name conveyed as soon as possible to the legal title of the Order of St. Benedict of New Jersey.

SECOND: He remained a member of the Order up to the time of his death, died as such member, and was buried at the expense of and under the direction of the said Order, the funeral charges being paid from a portion of the funds found in his possession at the time of his death, the balance of which, together with his personal effects, were sent on to said Order.

THIRD: He accounted continuously up to the time of his death for funds received as salary and perquisites from the parishes at Elizabeth, N. J., Springfield, Minn., and elsewhere where he was sent from the time of his joining the Order of St. Benedict of New Jersey till the last fiscal date before his death.

FOURTH: The funds derived from the sales of his books he was allowed to retain by the specific permission of the Abbot of said Order, to be used, however, solely for charitable purposes.

FIFTH: There is no evidence in the record to show that he used any portion of these funds for his personal gratification or desires with the exception of

what he possibly spent therefrom on his trip to Europe without permission, for which he was reprimanded both by his immediate superior and the Abbott Primate at Rome, the head of the entire Benedictine Order.

SIXTH: It is conceded that nearly if not all the funds in his possession were the proceeds of sales from his books which he had express permission to retain to be disbursed solely for charitable purposes.

SEVENTH: These books were copyrighted by him not in his personal name but in the name of "Augus-"tin Wirth, O. S. B," which conclusively showed his intention to describe himself not as an individual owner of the copyright, but as a member of and agent for the Order of St. Benedict.

EIGHTH: The contract made by him with the Benziger Bros. as his publishers and booksellers described him as a member of the Order and Nicholas Benziger especially testified that his firm would not have made the contract with Wirth as an individual.

NINTH: He was assisted in the publication and sale and distribution of his books by members of the Order when he was at the Abbey (97, 98).

TENTH: He was sojourning in Springfield, Minn., at the time of his death only upon an "*ad tempus*" permission of his Superior, the Abbot of the Order of St. Benedict of New Jersey, and was liable to be recalled at any time.

It is submitted that these facts, which have all been demonstrated in the foregoing points, are more than sufficient to show that the property in possession of Augustin Wirth at the time of his death was the property of the Order of St. Benedict of New

Jersey and held by Wirth in trust for that corporation.

The mere fact that he had not made a physical transfer thereof is unimportant. He was taken suddenly ill with pneumonia and died after a brief sickness. He had permission to retain these funds to be expended for charitable and educational purposes, and he was then engaged in building a school at Springfield, where he was stationed.

It is important to note that the learned Circuit Court of Appeals has tacitly admitted that if this physical transfer had been made before his death, neither could Wirth have recovered the property so transferred, nor could his legal representatives have claimed it after his death (323).

It is difficult to understand exactly upon what theory the learned Circuit Court of Appeals arrived at the conclusion that this fund belonged to Wirth personally. It seems to have inferred from some of the circumstances that, as it states, "Wirth had "permission of both Abbots to receive the income "from his books and retain it as his own property "and that the Rule upon which the complainant "relies and which is a part of its charter permits "this" (334). The positive testimony of Abbot Hilary repeated again and again in the record is directly to the contrary. There is no reason to doubt nor is there any attempt to discredit Abbot Hilary who certainly knew more about this matter than any other person living, since he alone had the power to give the permission which was given. The learned Circuit Court of Appeals does not attempt to rely upon the mere hearsay evidence of the two witnesses for the defense who testified indefinitely that Father Wirth had told them that what he earned with his pen was his own, and that he had permission from the Abbot to write books and do with the money what he liked (305). This evidence is of itself not inconsistent with that of Abbot Hilary as Wirth might have considered that having the privilege to spend the money for charitable and edu-

cational purposes in his own way was doing as he pleased with the money. The learned trial Court at Circuit rejected it absolutely and found as a matter of fact that the permission was to use the money for charitable purposes (305).

Nor are we inclined to agree with the statement of the learned Circuit Court of Appeals that "the "Rule upon which the complainant relies, and "which is a part of its charter permits this" (334). We should rather hold with the learned Judge of the Circuit Court that "the evidence does not justify "a finding that there was a permission that the "money he received from the sale of his books "should belong to him as an individual. Such a "permission would be entirely inconsistent with the "vow of poverty, the fundamental idea of the Order, "and it would be beyond the power of the Abbot to "give" (305-6). That is our conception of the Rule. It is not, however, the fact that the complainant relies solely upon this Rule. It relies upon the contract evidenced by the Charter, Constitution and By-Laws of the Order of St. Benedict of New Jersey, of which Augustin Wirth was a member. And as the learned Judge at Circuit has well said: "There is "nothing in the charter, constitution or by-laws, "which authorizes the Abbott to single out one of "the monks and say to him that all or a part of "what he earned might belong to himself" (306).

It is evident also from the opinion of the learned Circuit Court of Appeals that it has entirely misconceived the force, purpose and effect of the permission given Wirth, as will be apparent from the following quotation:

"Nor does he explain how Rev. Wirth while in "Minnesota could have expended the income from "his books for the charitable purposes of the Order "in New Jersey. Again, it would have been a "useless thing to have given Wirth permission to "have expended this income for the benefit of the "complainant" (334).

This of course is an entirely erroneous idea of what this permission was. The permission was to expend the money "for charitable purposes" (149, 185). It was not limited to the "charitable pur- "poses of the Order of St. Benedict of New Jer- "sey," nor "for the benefit of the complainant," but for any such charitable purposes as might receive the approbation of his superiors wherever he was stationed, and with the understanding that at all times he held the money in trust for the Order of St. Benedict of New Jersey, and what he did not so use in accordance with this permission should revert to it upon his death.

It is respectfully submitted that the testimony adduced and which has been referred to at length in the two preceding points and briefly recapitulated here, establishes by a clear preponderance of credible evidence that the funds in Augustin Wirth's possession at the time of his death were held by him in trust for the Order of St. Benedict of New Jersey.

POINT FOUR.

A court of equity could rightfully decree an equitable title in The Order of St. Benedict of New Jersey as against the administrator of Augustin Wirth, deceased, of the property in question.

If the propositions sought to be established by the preceding points have been sustained by the evidence, by argument and by authority, and we respectfully submit that such is the case, the above proposition follows as a matter of course. We claim to have established that the funds held by the Administrator are in fact trust funds belonging to

the Order of St. Benedict of New Jersey. The Administrator claims the naked legal title thereto. The complainant's title is at present an equitable title only. That is especially true of the proceeds of the books sold by Benziger Bros. since the fall of 1906 under the contract of Wirth with that firm, for the reason that the copyright on such books was issued in the name of Augustin Wirth, O. S. B.

The Order of St. Benedict of New Jersey asserts that the contract between Augustin Wirth and the said Order was sufficient *ipso jure* and without an express instrument in writing to transfer both the equitable title to said books and all the benefits to be derived therefrom.

This proposition may be readily sustained for the following reasons:

FIRST: It is established by competent authority that an inchoate right to a copyright may be transferred by parol prior to the actual taking out of the copyright.

Black *vs.* Henry G. Allen Co., 42 Fed., 618.
Callaghan *vs.* Meyers, 128 U. S., 617.
Carte *vs.* Evans, 27 Fed., 861.
Pierpont *vs.* Fowle, 2 Woodb. & M., 23.
Gould *vs.* Banks, 8 Wend., 562.

SECOND: Although the copyright vests in the name of the party who takes it out, he may nevertheless be a mere holder in trust for the legal owner; and in such a case, where another is the actual owner, a court of equity may compel an assignment.

Lawrence *vs.* Dana, 15 Fed. Cas., 26.
Little *vs.* Gould, 2 Blatch., 165.
Pulte *vs.* Derby, 5 McL., 328.

THIRD: The person who employs another to prepare a work may, because of the circumstances of

the employment, become entitled to whatever literary property exists in the production.

Lawrence *vs.* Dana, *supra.*
Carte *vs.* Evans, *supra.*
Callaghan *vs.* Meyers, *supra.*

It is of course evident that the Order of St. Benedict might at any time have withdrawn the permission and compelled the assignment of these copyrights. That for reasons that seemed sufficient to it, it did not choose to do so, in no wise lessens its right to be declared the owner thereof now.

A court of equity therefore not only can grant the relief which is sought by the complainant's bill, but that relief can only fully be granted by a court of equity.

It is submitted that all necessary facts have been demonstrated to show the propriety and necessity of equitable intervention.

CONCLUSION.

The decision of the Circuit Court of Appeals should be reversed and the decree of the Circuit Court affirmed, with costs in all courts to the plaintiff in error.

OTTO KUEFFNER & ALBERT SCHALLER,
Solicitors and Counsel for
Plaintiff in Error.

MORGAN J. O'BRIEN,
ARNOLD & GREENE,
FREDERICK C. GLADDEN,
Of Counsel.

J. Warren Greene

[2390N]

Frank W. Arnold

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 267

OCTOBER TERM, 1913

THE ORDER OF ST. BENEDICT OF NEW JERSEY,

Plaintiff in Error and Petitioner,

vs.

ALBERT STEINHAUSER, INDIVIDUALLY AND AS ADMINISTRATOR, ETC., OF THE ESTATE OF AUGUSTIN WIRTH, DECEASED.

Defendant in Error and Respondent.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR AND RESPONDENT.

WILLIAM H. PITZER and
WILLIAM HAYWARD,

Solicitors.

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Defendant in Error and Respondent.

The respondent is without knowledge at this writing of the extent of the statement of issues and facts which will appear in the brief on behalf of complainant; and for that reason there is shown following a brief outline of the record, to include especially such issues and facts in evidence as are deemed by the respondent essential to a determination of the questions presented in this Court.

I. STATEMENT.

The order of St. Benedict of New Jersey, a corporation of that State, upon whose petition the writ of certiorari was allowed in this case, was complainant in the Circuit Court of the United States for the District of Minnesota, the trial Court. The respondent is the ad-

ministrator of the estate of Augustin Wirth, deceased, under Letters of Administration issued by the Probate Court of Brown County, Minnesota. The complainant, alleging diverse citizenship, sued the respondent in equity to establish a trust, an equitable right, in its favor in property, the title and possession of which were in the respondent's intestate at the time of his death, which property except such trust or equitable right be established, vested in the respondent as administrator, and was distributable at the completion of administration to the heirs at law of said Augustin Wirth, deceased. This property consisted of moneys, notes, copyrights to literary works, and royalties accruing on publishers' contracts made with said Augustin Wirth in his lifetime. (1, 3)

On demand made by the complainant upon the publishers of such copyrighted works after the death of Augustin Wirth, which demand was based upon the same grounds as constitute the basis of complainant's claim in this suit, certain moneys were paid by the publishers, Benziger Brothers, to the complainant. (4.) Certain other securities and moneys of Augustin Wirth were taken into possession by complainant before the respondent's appointment and qualification as administrator, but under no other claim of right than that upon which its claim is based in this action. (4)

This property and the royalties paid complainant by Benziger Brothers prior to 1907, remain in the complainant's possession. (4, 8)

Some property came into the hands of the respondent. (27) In 1906 the administrator sued Benziger Brothers at law in the Circuit Court of the United States for the Southern District of New York for royalties upon their contract with Augustin Wirth accrued since his

death. (56) Benziger Brothers held the complainant responsible to them, and the complainant acknowledged that responsibility, and in the name of Benziger Brothers brought an equity action in the same court to enjoin the prosecution of the law action until the sufficiency of their equitable defense to the law action could be determined; and thereupon pleaded as an equitable defense to the respondent's action at law against Benziger Brothers the same facts as are pleaded in the original Bill in the present action as the basis of the complainant's claim to the title and ownership of the estate property in this action. (56) The action in equity thus prosecuted in the name of Benziger Brothers is entirely under the complainant's control. (124, 127, 129.) Since its commencement, Benziger Brothers have retained the accrued royalties, holding the complainant's obligation to repay them the payments theretofore paid the complainant, in the event it be finally adjudged that such payments are not valid payments,—not rightfully received, and thereby their liability to the respondent be not discharged. (137, 138)

In the action brought in the United States Circuit Court of New York by Benziger Brothers demurrer to the Bill was overruled, opinion by Judge Ray, **Benziger v. Steinhauser,** 154 Federal 151. That action is now pending and undetermined and awaits the determination of this suit.

The subject matter of the Bill in this case embraces all of the foregoing facts and transactions; the copyrights taken by Augustin Wirth in his own name, with prayer for the assignment and transfer thereof to the complainant; the contract with Benziger Brothers and the royalties accuring thereon and paid to the complainant after the death of Augustin Wirth, with its prayer that it be adjudged entitled to the moneys so

paid; and the moneys and property in the hands of the respondent, and as to this, assignment and transfer thereof to the complainant is prayed. In fact, the prayer of the Bill is this: (9)

> "To the end therefore that your orator may have that relief which it can only obtain in a court of equity and that the said defendant may answer the premises, your orator now prays the Court that it may be adjudged that the equitable title to the moneys, notes and mortgages and other property and copyrights mentioned in this bill of Complaint is in the Order of St. Benedict of New Jersey, and adjudging further that the payments made by Benziger Brothers to the Order of St. Benedict of New Jersey were valid payments and that your orator was entitled to the moneys so paid, and not the defendant as administrator of Augustin Wirth, deceased; and that this Honorable Court will grant an order directing the defendant to pay over and transfer the moneys, notes and mortgages and other property, herein mentioned to them, and also to assign said copyrights; and that your orator may have such further or other relief as to the Court may seem proper."

The *right* claimed as the basis for the decree thus prayed for exists, if at all, in the documents shown as Exhibits to the Bill, and shown in evidence. These comprise:

Exhibit "B", said to be the Rule of St. Benedict. (9)

Exhibit "C", said to be the membership vow of Augustin Wirth. (11)

Exhibit "D1", the Act of the Legislature of the State of Pennsylvania, incorporating the Benedictine

Society in Westmoreland County, Pennsylvania, the Society of Augustin Wirth's original membership. (12)

Exhibit "D2", By-laws of the same Society. (13)

Exhibit "F1", the Act of the Legislature of New Jersey incorporating the complainant. (16)

Exhibit "F2", the Constitution and By-laws of the complainant. (17)

In these, it is said, are stated the terms upon which the membership of Augustin Wirth in the complainant's Society or corporation was conditioned; and it is claimed that such membership so conditioned constitutes a contract,—a "membership contract", so to speak, between Augustin Wirth and the complainant, the obligations of which, it is alleged, the complainant has fulfilled, but which Augustin Wirth did not fulfill, —"was prevented by death" from fulfilling; and to enforce which the present action is brought. (7, 8)

The Bill contained no waiver of answer under oath.

By answer under oath (24, 36) the respondent put in issue all allegations of the Bill excepting only the death of Augustin Wirth intestate, the grant of administration, the Benziger Brothers contract and its incidents, Father Wirth's priesthood, the pendency of the actions by and against Benziger Brothers in the United States Circuit Court in New York, and the receipt by complainant of moneys and property of the estate of Father Wirth since his death.

There is also pleaded as matter of defense (Sixth: 31) full knowledge on the part of complainant for many years of Wirth's acquisition, use, investment and disposition of the proceeds of his literary works; of the fact

that he contracted and dealt with and claimed all such property, and its proceeds as his own; and the consent of complainant and its acquiescence in his claims and ownership, by reason of which his ownership at the time of his death and its consequent descent to his heirs according to the Statute could not be disputed by complainant.

Later, upon leave granted, the cross-bill of respondent against complainant (44) was filed, based upon the admitted facts and those pleaded by way of answer, praying for decree in respondent's favor determining all matters in controversy between respondent and complainant, and settling the rights of the parties to all the estate property; and that complainant account for and pay over to respondent as administrator, all estate money and property received and taken by it upon and subsequent to Wirth's death. Further than a statement (61) of the property received by it, in addition to the payments made to it by Benziger Brothers (4) complainant's answer to the cross-bill contains no allegations of fact, not already pleaded, admitted, or put in issue.

The "Rule of St. Benedict" (Exhibit "B" 11) said to contain the "vow of poverty" is in part this:

> **"And let it be not allowed for any one to have anything which the abbot did not give or permit him to have."**

The corporate powers of complainant were by the Act of the Legislature of the State of New Jersey incorporating the complainant's Society expressly limited in the following respects:

> "* * * * To take hold and enjoy lands, tenements and hereditaments, and to make such by-laws

for their government and for the admission of members into the corporation, as they shall deem necessary and proper; **Provided, That such by-laws shall not be repugnant to, nor inconsistent with the Constitution of the United States or of this State**; and provided also, that the clear yearly income of the real estate to be held by said corporation, exclusive of the houses occupied by the Order in this state and grounds thereto attached, shall not exceed the sum of three thousand dollars; and **provided, that no person shall be or remain a corporator except regular members of said religious society, living in community and governed by the laws thereof.**"

In addition to the facts admitted in the pleadings it may be conceded that the evidence satisfactorily shows these facts:

That Augustin Wirth was born in Bavaria in 1828; was ordained to priesthood in 1852; was admitted to membership in the Benedictine Society in St. Vincent's Abbey in Westmoreland County, Pennsylvania, in the same year; that from that time to his death in 1901 he was engaged in church work in Kansas, Minnesota, Pennsylvania, New Jersey and Delaware; that in 1887 the transfer of his membership (Exhibit E: 15) was made from St. Vincent's to St. Mary's Abbey of Newark, New Jersey, within the ecclesiastical jurisdiction of The Order of St. Benedict of New Jersey; that the Act of the Legislature of New Jersey incorporating complainant and complainant's Constitution and By-laws are as set out in Exhibits F1 and F2 (16,17); that the purpose of membership in the Order is to live in community apart from the world in monastic life, devoting themselves to charitable and educational work; that Wirth was a voluminous writer and publisher, copyrighting his works in his own name.

On the other hand, it is also beyond question that Wirth had property at the time he became a member of the Order; but made no transfer of that property to the complainant (161); that before his membership was transferred in 1887 to St. Mary's Abbey, he wrote and published books on his account, with the knowledge of his superiors, and that this was considered his privilege; that no account was ever given of the moneys received from this source nor was any account ever asked. The witness Hilary Pfraengle, Abbot of St. Mary's, testifies:

> "He had some (property) from his books, not much; but he had some permission before he joined us as regards his books." (172)
>
> "I could only account for moneys after he joined us, and I continued the permission; before he joined us I continued it." (173)
>
> Q. Did you ever receive an account from Augustin Wirth?"
>
> "A. Not I. Not while in Springfield. (176) "I know that the old Archabbot of St. Vincent's had already conceded that privilege and he died in 1887." (177)
>
> "Q. And all these moneys he never accounted to you for?"
>
> "A. No." (178)

Nor was any demand ever made by complainant before Wirth's death for any moneys or accounting by Benziger Brothers. (157)

Father Wirth travelled in Europe without permission, using and spending what he considered his own money, from the summer of 1897 to the spring of 1898. (158)

Following this, Hildebrand, Abbot Primate of complainant's Order, wrote him from Rome, June 20, 1899 (170), expressing dissatisfaction with his course in so travelling, in spending money, and in failing to account to complainant's Abbot; and in conclusion in this letter, the Abbot Primate says: (171)

> **"I want you therefore to do two things, the first to write to your Abbot in order to apologize for your past conduct and then to forward him the account of the money you keep and of that you have spent, asking your superior how you are to behave in this respect for future time."**

Prior to this, February 5, 1899, Hildebrand had written upon the same subject to complainant's Abbot, Father Hilary, wherein he wrote: (182)

> **"And with regard to money matters, you ought at least to impose him (Wirth) to give you a minute account of what he possesses and to oblige him to tender in every six months an account of his expenses."**

Abbot Hilary, with his attention called to this correspondence, and in testifying in reference thereto, says: (176, 178, 179)

> "Q 708. And notwithstanding the admonition of the Abbot Primate, complainant's Exhibit No. 11, Augustin Wirth did not account to you?
>
> "A. No.
>
> "Q 730. Then, Father Hilary, take this admonition of the Abbot Primate, plaintiff's Exhibit 11 of today, what were the moneys that were in controversy here, moneys that Augustin Wirth received from the sale of his books, or moneys

which came into his possession through the transaction of his church work?

"A. It must have been from his books and the Abbot Primate did not understand the question there. He did not know that privilege that Augustin had.

"Q 731. Were you making complaint to the Abbot Primate that Augustin Wirth failed to account for the moneys which he received from his books?

"A. No.

"Q 732. It was the moneys which he failed to account for that he obtained in the prosecution of his work as a Priest?

"A. Yes."

Complainant's account with Wirth verified by the Abbot himself (151) showing only receipts from Wirth, —no expenditures on his account,—includes no entry prior to January 9, 1888, nor subsequent to December 12, 1889.

At the time Wirth transferred his membership to complainant in 1887, he had already accumulated some property from his literary works. (172) It is nowhere shown in evidence that any transfer was made of this property to the complainant; and it is in evidence that at the time of this transfer of membership no property was transferred by Wirth to complainant. (161)

It was at this time that the "permission" already given him by the old Archabbot of St. Vincent's, the Order with which Father Wirth had prior to that time been a member, was continued by the complainant's Abbot, Father Hilary. (177)

Others than Father Wirth and his Superiors knew

of his right to the proceeds of his literary works. (Rose Schneider, 261; Elizabeth Wirth, 275; Florian Wirth, 289)

But he was not to obligate the church in any way, or to use the money of the church, in the publication and sale of his books. (261, 262, 275)

The dissension between Father Wirth and his superiors related in no way to the moneys derived from the sale of his books. (178, 179, 265, 266)

Father Wirth went to Springfield, Minnesota, in 1898. (176) There he as a priest was under the direction of Archbishop Ireland (234) and in all financial matters was responsible to him, and not to Abbot Hilary (197). His assistant there was not a member of complainant's Order (235); nor had he while in Minnesota any association with St. John's Abbey, the home of a Benedictine Society near Springfield in Minnesota. (196)

The trial court denied relief as prayed in respondent's cross-bill, and directed a decree as prayed by the complainant, sustaining the equitable ownership claimed by the complainant of the estate property. (308, 309)

On appeal by the respondent to the Circuit Court of Appeals of the Eighth Circuit, the decision of the trial court was reversed and decree dismissing complainant's bill and sustaining the respondent's prayer in his cross-bill for accounting. (335)

The appellate court, rather under protest, and because its decision was reached upon other grounds, accepted the trial court's finding of fact, that Father Wirth continued a member of complainant's Order to the time of his death. (328)

Both the trial court and the appellate court found as a fact that Father Wirth had the permission of his superiors to pursue his literary works and to retain the money derived from the sales of his books. (305, 334)

The trial court, held, however, but *as a conclusion of law*, that it was beyond the power of complainant's Abbot to grant permission to Wirth to retain this money and property otherwise than to be used for charitable purposes, and impressed a trust upon the estate property accordingly, considering the permission mentioned so qualified, thereby preventing the operation of estoppel pleaded by respondent. (306)

The appellate court held the contrary. (334)

The trial court also as a conclusion of law, held the alleged contract to be *an executed contract;* and as such violated no rule of public policy. (299)

The appellate court decided the contract sued on, if a contract at all, to be executory as to the subject matter of the suit, and that it was inequitable to grant specific performance because not in harmony with public policy to do so. (333)

Under the issues presented, and bearing in mind the relation of complainant to the pending suit of **Benziger v. Steinhauser,** all matters of controversy between the personal representative of Augustin Wirth and the complainant may be in this suit adjudicated without possibility of conflicting decisions.

II. AS TO ASSIGNMENTS OF ERRORS.

Assuming that in harmony with the rule stated by this Court in **Hubbard v. Tod,** 171 U. S. 474, 43 L.s. Ed. 246, the brief of the complainant will follow those

errors assigned in the petition for writ of certiorari, a discussion of these assignments of error will correspond in numbers with the numbers given in the petition for the writ.

The assignments of error referred to are four in number. (Petition for Writ of Certiorari, page 15)

These assignments of error raise the following questions respectively:

1st. Whether or not the contract relied upon by the complainant, as alleged in the bill of complaint and shown in evidence, was an *executed* contract?

2d. Whether or not the contract so alleged and in evidence is void as against public policy?

3d. Whether or not the complainant established by clear and satisfactory evidence that the property in the possession of Augustin Wirth, the respondent's intestate, at the time of his death, was held by him in trust for the complainant?

4th. Whether or not on the record in this case, the trial court sitting as a court of equity, could decree equitable title in the complainant as against the respondent, the administrator of the estate of Augustin Wirth, deceased, of the property in question?

On the other hand, and as corresponding to the foregoing assignments of errors, and as relating to the same subjects, the respondent, believing in their correctness, submits that the following propositions are sustained by law and the record in this case and decisive of all questions presented in this review:

1. The terms of membership between the respond-

ent's intestate and the complainant alleged at length in the Bill and comprised in the various documents above referred to, constituted at most under the facts in this case, and as to the subject matter of this suit, an executory contract.

2. The rules of law stated by the Circuit Court of Appeals as applicable to the facts in this case and as decisive of the matters in controversy, are in no way inconsistent with principles established by this Court or decisions of other United States Courts, so as to result in such conflict of judicial decisions as to justify review by certiorari; neither, considering the status of the present controversy, does a decision of the questions involved herein become of such public importance as to justify such review in that manner; and therefore, the writ of certiorari should be dismissed, leaving the decree ordered by the Circuit Court of Appeals in this case, final.

3. Complainant's action to establish its equitable ownership and right to the possession of the estate property is barred by the Statute of Limitations of the state of Minnesota.

4. Upon the record of this case no equitable right has been shown by the complainant to the subject matter of this suit, because, (a) the contract relied upon is, as to the property in question, executory, and to that extent its enforcement is contrary to public policy; and (b) the complainant, on the record in this case, is clearly shown to be estopped from at this time asserting any equitable right or ownership to that property which is the subject matter of this suit.

5. The terms and conditions of the membership contract as construed by the complainant, and as maintained in this action, are, as applied to the subject matter

of this suit, and in so far as such contract is unexecuted, so inequitable, and inimical to American institutions, that public policy will not warrant an enforcement thereof to the extent claimed by the complainant.

And finally, upon the whole, that all questions of public policy, or as to the validity or enforcibility of the obligations as to individual property, whether owned or after acquired, claimed for the membership contract sued on may be eliminated,—were in fact eliminated by the appellate court,—and the appellate court's decision is correct and remains the same, expressly based by it upon facts found from the evidence, held to be inconsistent with the equitable right claimed. For the appellate court denied complainant equitable ownership in Wirth's property, for the reason that, *as found from the evidence,—found also by the trial court*,—the obligations claimed for the membership contract as to his individual property, derived (as is the estate property) from his literary works, and its accounting and transfer to complainant's Order, were expressly waived by complainant's officers, and no claim of right thereto was ever in the lifetime of Wirth, asserted by complainant, and the correctness of this finding, under a well established rule of this Court, will not now be questioned.

It is rather at the risk of criticism for lack of that degree of conciseness required by the rules, than otherwise, that the foregoing statement is so extended; and if it must be justified, it is so made to aid in analysis and understanding of all questions which may arise in this review for decision. And it is in the order last indicated, and still without complainant's brief, that the argument for respondent's propositions last stated will now be taken up.

III. ARGUMENT.

Point I. The purpose of the action on the part of

the complainant being to compel performance neglected or refused on the part of the other party to the alleged contract, and to establish title not now possessed by the complainant for want of such performance or execution, the contract is executory as to the property involved in this suit.

The present action maintained for the purposes and with the objects declared in the bill of complaint, where equitable jurisdiction is invoked to establish equitable title to the property in Augustin Wirth's possession at the time of his decease, is in itself a contradiction to the position now taken by the complainant under its first assignment of error; for the case as stated in the Bill is based upon and involves the assumption of an uncompleted transaction, a contract not carried out, unexecuted by the respondent's intestate, as to the subject matter of this suit.

The trial court with the bill of complaint before it seeking to establish an equitable right in property in Augustin Wirth's possession at the time of his death, because of alleged performance on complainant's part, but with incomplete title and possession, because of the non-fulfilment of the terms of its contract by the respondent's intestate,—*because of his failure to execute it*,—nevertheless finds performance complete, and the contract therefore executed.

For the trial judge wrote: (299)

> "So far as the performance of the contract is concerned, this suit presents the case of an executed contract and not the case of an executory contract."

Again, and in reference to **Baltimore Humane Society v. Pierce**, 100 Md. 820, cited by respondent, the trial court wrote:

> "Without passing upon the soundness of this decision, it is enough to say that it furnishes no support for the proposition that after Pierce's death, *his executor could have recovered from the Home* the value of the services which Pierce might have rendered to it in consideration for his support during life."

The appellate court, looking to the nature of the action, the relief prayed for and the subject matter of the suit, determines the question to the contrary.

The error, if error there was, is fundamental. On the other hand, if the appellate court's conclusion is correct, the error is none the less fundamental but lies at the foundation of the complainant's case.

There need be no misconception either of the purpose of this action, the status of the controversy or of the subject matter of this suit.

"Your Orator", so the Bill concludes, "alleges that it is remediless in the premises at and by the strict rule of the common law and is only relievable in a court of equity". (8)

The cause of the complainant's predicament, as here stated, is apparent from the Bill. Augustin Wirth, it was alleged, had published literary works, copyrighting the same in his own name; and there had accrued after his death, upon the royalty contracts entered into for the publication of his literary works, various sums of money which had been paid by Benziger Brothers (the publishers) on demand made after Wirth's death to the complainant, and Wirth himself had received moneys from the sales of his literary works which he had not paid over to the complainant and which came into the respondent's hands. (4, 7)

Father Wirth, it was further alleged "did not in his lifetime transfer or assign to the Order of St. Benedict of New Jersey said property, and was prevented by his death from so assigning, transferring and conveying the said property above mentioned, and to assign the copyrights as aforesaid". (7, 8)

Accordingly, and because of lack of legal title or a right of possession, equity is invoked in the complainant's favor,—

> "that it may be adjudged that the equitable title to the money, notes and mortgages and other property and copyrights mentioned in this bill of complaint is in the Order of St. Benedict of New Jersey; and that it be adjudged further that the payments made to the Order of St. Benedict of New Jersey by Benziger Brothers be valid payments * * * and that this Honorable Court will grant an order directing the defendant (respondent) to pay over and transfer the moneys, notes, mortgages and other property herein mentioned, to them, and also to assign said copyrights". (9)

And if this is not sufficient as the basis of an intelligent conclusion of this point, note the following from the complainant's petition and brief for writ of certiorari filed in this case, pages 23 and 24:

> "Upon the death of Father Wirth it was found that there stood in his own name certain bank accounts, notes and mortgages amounting to about five thousand dollars, and copyrights to a number of books written by him and published by Benziger Brothers, a large publishing house in New York; all of which property in equity and good conscience belonged to the Order of St. Benedict, and which, but for the sudden death of Father Wirth, would have

been transferred to his Order had he been duly requested to do so by the Abbot.

"To enforce this equitable ownership and compel a transfer of the legal title of the same from the administrator to the Order, this suit was brought."

The trial court's view on this is indicated by the following: (299, 300)

> "So far as the performance of the contract is concerned, this presents the case of an executed contract, and not a case of an executory contract. * * * It is in effect a claim that had Wirth before his death paid over to the Order what he received from the sale of his books or for his personal services, his administrator or his heirs could, nevertheless, after his death, have maintained an action to recover back the amount so paid and the value of his services."

Quoting this, the Circuit Court of Appeals in the opinion by Judge Reed says: (333)

> "This, we think, is a clear misconception of the purpose of this suit and of the status of this controversy. If the alleged contract between the complainant and Father Wirth had been fully executed, by the rendition of the services, or the conveyance of the property in controversy to the complainant, there would, of course, have been no occasion for it to resort to a court of equity for the specific performance of the contract, or to establish an equitable right to the property, which the Circuit Court held the suit in effect to be, but it could have rested upon its legal title to and possession of, the property. **The fact that the complainant was driven to this suit is of itself sufficient to show that the alleged contract was not in fact an executed one.** * * *

> **"That the alleged contract was not executed as to the property in controversy, we think admits of no doubt. * * * We have no doubt that as to the property in controversy the alleged contract on the part of Father Wirth was executory only."**

The respondent's cross-bill (38, 49) seeks to affect no property which is not included in the subject matter of the action in the Bill itself.

Neither is it an action seeking in any way to restrain the respondent from seeking to recover from the complainant, (as assumed by the trial court) moneys paid the complainant and services rendered the complainant by the respondent's intestate.

Under the view taken by the Circuit Court of Appeals on this question, however, as above indicated, the fact that the complainant felt the necessity for resorting to a suit in equity for specific performance, conclusively shows that the contract was executory; for if executed, the complainant's title and possession would not require the aid of a court of equity. The execution of the contract would have vested complainant with both title and possession to the property. And if wrongfully deprived by the respondent of either title or possession, recovery could be had in the law courts.

Proceeding upon the conclusion that the contract was executed, the trial court found no difficulty in applying the precedents established by a line of cases sustaining, because *in every case executed* "membership contracts" not wholly dissimilar to the case at bar. These cases are what we may be permitted to term the "Community" cases cited at length in Judge Willard's opinion (301, 305) and by the complainant in its brief

for writ of certiorari. (Petitioner's Brief, pp. 24 to 29 incl.)

The same cases are cited by Judge Ray in **Benziger v. Steinhauser.** (154 Fed. 151.)

Generally speaking, and deferring to a later subdivision more extended notice, the cases referred to present instances of where those, either at the time or formerly, members of a Community holding property in common, *sought to recover from the Community* the value of the services rendered, or an interest in property, the right, title and possession to which had been voluntarily vested in the Community. One case only at this point may be taken as illustrative, to be here noted viz:

Goesele v. Bimeler, 14 How. 589:

A Society called the Separatists emigrated from Germany to the United States. They were very poor, and one of them, in 1817 purchased land in Ohio, for which he gave his bond and took title to himself. Afterwards, they adopted two constitutions, one in 1819 and one in 1824, which they signed, and in 1832 obtained an Act of Incorporation. The articles of association, or constitutions of 1819 and 1824, contained a renunciation of individual property.

This action was for *partition, brought by the heirs* of one of the members of the Society, and related only to real estate acquired prior to the signing of the articles by the ancestor, who never, in his lifetime repudiated the contract, or made any attempt to assert ownership over the property in controversy. On the contrary he worked with the Society until he died, giving to it the product of his labors.

This is the case from which the complainant in the petition and brief for writ of certiorari in this case, quoted at length. (Petitioner's Brief pp. 25 to 27 incl.) And

without fear of criticism of the statement as being inaccurate in any essential respect, we make the assertion that not a single case cited in the list of cases referred to is different in principle from **Goesele v. Bimeler**, and it is with the utmost confidence that we invite, on this point, to determine the fundamental question as to whether this line of cases is applicable, and whether it forms a precedent for the determination of this case, the most critical examination of every case so cited.

The Circuit Court of Appeals correctly say of these cases: (330)

> "These suits were brought by members of the Separatists and Harmony Societies established in Ohio and Pennsylvania early in the last century, and the Oneida Community in New York established in 1848, by members thereof respectively, after they had withdrawn from the Society, or by the heirs of a member after his death, for partition of the property of the Society, or to recover the value of property conveyed for services rendered to it before the withdrawal or death of the member; except that in the Oneida case the suit was by one who had withdrawn from the Society to be reinstated therein. The contracts there involved had been fully performed by each of the parties, and it was held in each case that there could be no recovery. **The facts in each case are so materially different from those in this case that the decisions have little or no bearing upon the questions here involved. This suit involves only the property acquired by Father Wirth after he joined the Society, the legal title and possession of which he retained until his death.**"

The bearing upon other questions later discussed, of the determination of the correctness of the appellate

court's conclusion that the contract sued on is as to the subject matter of this suit executory and not executed, is thus apparent. Wirth himself might voluntarily submit that ecclesiastical rules, laws and construction govern his obligations as a member of complainant's Order. Whatever he did, he knew what he was doing. That which he himself may have given complainant and by his voluntary act vested in complainant both title and possession, he knowingly did and such act on his part is irrevocable. But nowhere in the record can it be found where respondent claims or has ever claimed, the right to any moneys, property or services given and transferred by Wirth himself to the complainant. To that extent, to the extent that Wirth himself gave his time, his money or his property to complainant, he himself executed, so to speak, his membership contract. But to the extent that he withheld such transfer to complainant of his money or property, *for whatever reason*, he did not execute it. And the complainant in order to establish its right to such property, must bring itself and the contract it claims within legal and equitable principles as recognized not by ecclesiastical courts but by the civil courts.

Point II. The writ of certiorari should now be dismissed, because,—(a) the distinction between this, the case of an executory contract, and the cases of which Goesele v. Bimeler supra is representative, presenting executed contracts, is so clearly marked as to preclude all question of conflict between the decision of the United States Circuit Court of Appeals rendered in this case and the other decisions claimed to be controlling in authority; and, (b) the decision of the Circuit Court of Appeals expressly limiting as it does the applicaton of its conclusions of law to the property involved, as to which the contract is considered executory, and exclud-

ing the application of the principles so announced to any case where the parties to such a contract had completely performed it, the question of public importance is eliminated.

The appellate court, on the subjects embraced within the complainant's assignments of errors, stated the following conclusions:

1. That considering the status of the controversy and the subject matter of the suit, the action presented the case of an executory contract.

2. That the complainant, on the facts, showed no equitable title to the property, which forms the subject matter of the suit, being estopped by its conduct in relation to the respondent's intestate in reference to said property.

3. That as to the subject matter of the suit, and to the extent that the alleged contract was executory, its enforcement in the manner prayed by the complainant would be denied by a court of equity because contrary to public policy.

Nothing can be clearer, it would seem, than the correctness of the conclusion stated by the appellate court that the authorities relied upon by the complainant as controlling are distinguishable from the case at bar. And if distinguishable and not controlling, all possibility of such a conflict in decisions is eliminated.

No foundation in the record appears either in the issues or the evidence, for the statements of fact presented in the third subdivision of the complainant's petition for writ of certiorari (pp. 14 and 15) tending, as alleged, to show and present a question of public importance justifying review by certiorari. This issue was not

presented either in the trial court or in the appellate court, and the statement in the complainant's petition cannot be made the subject of litigation in this Court. The case, as we understand it, must be decided upon the record presented in the trial court, passed upon by the Circuit Court of Appeals, and the assignments of error made by the complainant.

But even if the assumptions of complainant in this respect are indulged, how can the conclusions stated by the Circuit Court of Appeals affect the interests of the religious societies mentioned adversely? This decision disturbs no possession or property rights vested in them, and it uproots no title.

The appellate court say: (333)

> "It may be that if Wirth had in his lifetime conveyed this property to the complainant, he could not thereafter ever recover it back, and that his legal representatives could not after his death; but of this we need express no opinion, for the question is not involved."

Point III. Statute of Limitations: The complainant's action, being either (1) an action upon a contract express or implied: or (2) for detaining personal property or for the specific recovery thereof; or (3) an action to enforce a trust or compel an accounting, accrued not later than 1899 and is barred by the Statute of Limitations of the state of Minnesota.

The answer of the respondent to the Bill in paragraph 10 (35) interposes the defense of the Statute of Limitations of the State of Minnesota, pleading specifically Section 4076 of the Revised Laws of Minnesota 1905. This Statute provides that actions of the following classes cannot be brought after six years from the time the cause of action accrued:

1. Actions upon contract express or implied.

4. Actions for taking, detaining or injuring personal property, including actions for specific recovery thereof.

7. Actions to enforce a trust or compel an accounting where the trustee has neglected to discharge his trust or has repudiated the trust relation.

Complainant's Bill is based upon an alleged contract, and the purpose of the action is primarily to establish a trust in Augustin Wirth in its favor, as to the property whch is the subject matter of this action.

It is of course understood that mere neglect on the part of a trustee to account or pay over moneys or property will not amount to holding adversely to the *cestui qui* trust; but it is equally true that a refusal to account, on demand therefor, will amount to such a repudiation of responsibility as trustee as will start limitations to running. And limitations will run from the time the *cestui qui* trust has knowledge or notice of the fact, either by express information or from the refusal or neglect of the trustee to account or acknowledge the relationship, that he does not intend longer to recognize that relationship.

It is alleged in the Bill: (7)

> "On or about the 20th day of June, 1899 the above permission was revoked by the Abbot of New Jersey and the Abbot Primate of Rome and from that time said Augustin Wirth was required to account to the Abbot of New Jersey for all moneys received by him."

Again quoting from the Bill (6) a portion of Section 12 of the Constitution of the Order:

> "Moreover that each member individually

> pledges himself to have all the property which he now holds or hereafter may hold in his own name conveyed as soon as possible to the legal title of the Order of Saint Benedict of New Jersey."

Complainant's Abbot, Father Hilary, produced and there is in evidence (171) a letter from Hildebrand, Abbot Primate of Rome, to Wirth, corresponding to the above allegation in the Bill, bearing date June 20, 1899, in which Hildebrand complained of Wirth's course in travelling abroad and spending money, and concluded with the following:

> "I want you, therefore, to do two things, the first to write to your Abbot in order to apologize for your past conduct and then to forward to him the account of the money you keep and of that you have spent, asking your superior how you are to behave in this respect for future times."

This letter constituted the revocation of the "privilege" testified to by Abbot Hilary. But, as already shown, the Abbot himself admits that no accounting was made, nor any attention paid by Wirth to the admonition in the Abbot Primate's letter. In the light of the declarations of Wirth, testified to by the witnesses whose testimony is above quoted, no other interpretation can be placed upon Wirth's attitude following June 20, 1899 than that of a refusal to concede any claim by complainant to the moneys derived from his literary works. It cannot have referred to the administration of his church affairs at Springfield, for in that respect he was accountable only to Archbishop Ireland.

The "revocation" by the Abbot Primate alleged is thus in evidence (171); but it is not in evidence that the accounting demanded, in fact *commanded*, by him, was made. The contrary was shown by complainant's Ab-

bot himself. (176) "*Forward to him (the Abbot) the account of the money you keep and of that you have spent*", is the command of Hildebrand in his letter to Wirth of June 20, 1899, by which, in the language of complainant's Bill, the "permission was revoked". To this Wirth made no response, nor did complainant's Abbot heed Hildebrand's command to him in February 1899 **to require Wirth to account.** (182, 176, 178)

From complainant's position, and upon its theory, this can be considered not otherwise than a refusal to acknowledge responsibility to complainant, a repudiation of all liability to be called to account, for the property invoked in this action. And being such, the Statute of Limitations runs from that time. The Statute having commenced to run in Wirth's lifetime, its running is not interrupted by his death. The Bill was filed August 19, 1907, more than eight years after being commanded by the highest authority in complainant's Order to account, and his refusal to do so.

The trial court dismissed the question here presented thus: (307)

> "The limitation is one of six years. *Wirth died* December 16, 1901. The bill was filed on August 19, 1907; and therefore *within six years from his death.*"

The question was preserved by assignment of error on appeal (314) and presented to the appellate court. That court having placed its decision upon other ground said: (334)

> "This renders it unnecessary to consider the defense of the Statute of Limitations."

It is here submitted as but another and sufficient reason for sustaining the decree directed by the appellate court.

Point IV: Complainant's permission to respondent's intestate, given at the time he became a member of complainant's order, to retain, use, and control his property, derived from his literary works, amounts to an obligation to claim no interest or rights in that property.

All the property involved in this suit is derived from sales of books, written and translated by Wirth, and copyrighted and published by him. That he was permitted to retain these proceeds and was not required to account to his superiors, is undisputed in the record; and this permission had been granted to him prior to 1887 while he was still a member of the Benedictine Society at St. Vincent's in Westmoreland County, Pennsylvania. (Hilary p. 172, Q. 711)

> "I know that the old Archabbot of St. Vincent's had already granted that privilege and he died in 1887."

At the time of the transfer of Wirth's membership to complainant's Order, he had some money or property, but no transfer of this was made to complainant, or required. (161, 172)

This permission, or privilege, was continued by complainant's Abbot. In fact Wirth's membership in complainant's Order seems to have been *conditioned* upon it.

> "He had some permission before he joined us as regards his books. I continued the permission; *before he joined I continued it.*" (Hilary pp. 172, 173)

Wirth, however, was not to use the church money nor to obligate the church in any way. (262, 265) This

work was superogatory on Wirth's part, not required of him, yet not forbidden; and it did not interfere with his duties in respect to his membership or priesthood. (166) This permission or privilege, this degree of independence, had been denied Wirth at one time by his Abbot; but on his appeal to the Bishop, the right he claimed was granted. (275, 289, 290) It was never afterwards questioned by the complainant, not even when the Abbot Primate of Rome directed complainant's Abbot to require Wirth to account. (182, 176)

The allegation of the Bill, however (7), is that Wirth's permission to retain this money was for expenditure *by him for the benefit of complainant's community* This allegation is sustained by no evidence, unless it be considered that the testimony given by Abbot Hilary, induced by leading questions, is worthy of consideration: (Hilary 165, Q. 623)

> "Q. 623. State, if you know, whether or not Father Wirth had a special privilege to hold moneys received from the sale of his books and to use those moneys for special purposes under the express permission of his superior?
>
> "A. Yes."

The trial court held, in form, a *finding of fact*, but in fact a *conclusion of law*, that this permission was that Wirth might use the money for charitable purposes. (305) Otherwise, it was said (306), the permission "would be entirely inconsistent with the vow of poverty, the fundamental idea of the Order, and it would be beyond the power of the Abbot to give. There is noth ing in the Charter, Constitution, or By-laws which authorizes the Abbot to single out one of the monks and say to him that all or part of what he earns might belong to himself." (306)

In other words, in the absence of evidence as to the exact terms of the permission, the qualification of the permission in the terms of the Bill, and in the terms expressed in evidence by complainant's counsel, was the only form in which the trial court could find consistency between the rules of complainant's Order and the permission.

As a finding of fact the trial court's conclusion mentioned should be considered without support in evidence, for Hilary's testimony is the only evidence offered by complainant on this point. He merely continued a permission already given, orally, and he was not present when the permission was originally given.

This qualification, moreover, will be found to be entirely inconsistent with the whole course of complainant and its Abbot. Hilary knew of Wirth's use of the money for his own use; knew that he was "spending money," and with this knowledge, if there had been the qualification attached claimed in the Bill, he certainly would have heeded the command of Hildrebrand to require an accounting.

Wirth himself considered the money absolutely his own. He so stated to others. (261, 275, 289) "He said that the money would keep him in his old age." (291) He made investments, loans and gifts of considerable sums to individuals, $3[illegible]0.00 to Elizabeth Quinn, and $1,000.00 to Rose Schneider, his housekeeper (254). No fact or circumstance in evidence respecting the conduct of the parties tends in the remotest degree to substantiate the existence of any such qualification as is alleged in the Bill. The record in this case must irresistibly force the conclusion that when Wirth's transfer of membership was made to the complainant, it was with the distinct understanding that complainant have no in-

terest in nor claim to the proceeds of his literary works; that complainant never intended to make, nor assert any claim to the same; that Wirth never recognized any right in complainant, but always considered it his individual property to invest, use and dispose of, among his kindred, or "to keep him in his old age", as under the law any individual might.

As already shown, the reason for the trial court's conclusion, that an unqualified permission was beyond the power of the Abbot to give, does not exist. In Judge Reed's opinion, speaking for the appellate court, it is well said: (333)

> "The Rule provided: 'And let it be not allowed for anyone to have anything which the Abbot did not give, or permit him to have.' This plainly authorizes the monk to have and hold in his own right that which the Abbot, who is the superior officer of the Order, may permit him to have. The Rule is by reference, made a part of the complainant's charter, and whatever the Rule permits the charter authorizes. The complainant cannot accept so much of the Rule as may be to its benefit, and reject that which may work to the advantage of the member."

And that Court's conclusion as to this alleged qualification is thus expressed: (334)

> "The conclusion is unavoidable that Wirth was permitted by the Abbot of St. Vincent, and the complainant's Abbot, to retain as his own property the income from his books. It is true, that later, in his testimony the Abbot testified that the permission given by him, and the Abbot of St. Vincent, was that he might devote the income from his books to the charitable purposes of the Orders. He was not

present when the Abbot of St. Vincent gave his permission, which was many years before Wirth came to the complainant; and he failed to explain how he knew that Abbot attached any such condition to his permission; nor does he explain how Rev. Wirth while in Minnesota could have expended the income from his books for the charitable purposes of the Order in New Jersey. Again it would have been a useless thing to have given Wirth permission to have expended this income for the benefit of the complainant; and such a permission is wholly inconsistent with the conduct of the Abbot in reference to such income, for he knew that Wirth was receiving and using it for his own benefit, and if he understood that such income was to be expended for the benefit of the Order, he certainly would have required of Father Wirth that he account for the expenditures, especially when requested by the Abbot Primate to do so. This he never did for the reason as he says, that Father Wirth had permission to use the same. **We are satisfied beyond any doubt that Wirth had permission of both Abbots to receive the income from his books and retain it as his own property, and that the Rule upon which the complainant relies, and which is a part of its charter permits this."**

The fact of the permission existing, undisputed in the record, and the conduct of the parties themselves, conclusively showing the construction placed upon its terms to be such as to vest in Wirth absolute ownership in his property, manifestly (to refer to the assignments of error) the appellate court could not and would not establish the equitable right claimed by the complainant. And independently of all question of enforcibility or validity of the obligations of the membership contract as claimed by the complainant, all question as to whether the contract as so construed by complainant

is consistent with public policy, the appellate court bases its decision upon facts in evidence which present neither a possibility of conflicting decisons nor of commanding public importance. And the decision of the appellate court, final except for review by certiorari, ought now to be considered final and conclusive of the issues and controversy presented herein.

Point V: The contract for which endorsement is sought in the Bill, is as to property of which Augustin Wirth died seized,and which forms the subject matter of this suit, executory; and as construed by the complainant, and as sought to be enforced in this action, it is contrary to public policy and void.

To sustain the validity of the obligation alleged by complainant to have been assumed by Wirth at the time he became a member of complainant's Order, viz: to assign and transfer to complainant not only all property he then had, but all that he should thereafter acquire, resort was had to ecclesiastical law. Witnesses learned in that law (Abbot Engle 195, 196; Abbot Hilary 80, 86, 130; and Abbot Hilary's successor 284,) testified that the taking of the vows of the monastic order "incapacitates" the member from acquiring or holding property, adducing various maxims to show that by reason thereof any property so acquired by the member became *ipso facto* the property of the monastery; because it seemed, of the member's *incapacity* to hold property.

The trial court considered that as Wirth could have left complainant's Order, but did not, therefore it could not be urged as an objection to the enforcement of the contract, that it deprived him of the right to acquire property. Apparently, in all seriousness, that court remarked: (301)

> "*He could resume his right* to acquire property for himself at any time he chose."

And respondent's question of the propriety of applying the principles and rules of the canon law was answered and disposed of by the trial court with this remark:

> "The Legislature of the State of New Jersey must have known what the religious Order of St. Benedict was when it incorporated The Order of St. Benedict of New Jersey."

Therefore, the trial court said, the obligation of the contract referred to violated no known principle of public policy and based upon this, complainant's equitable ownership was established in the property in controversy, because of the alleged promise to transfer all after acquired property, because Wirth *did not repossess himself of his right to acquire and hold property* by severing his membership in complainant's Order.

From this it is apparent that the view of the trial court was in harmony with the theory upon which complainant's case is presented, viz: that the rules of the canon law are applicable and controlling here. We urged the contrary there and in the appellate court, and we now submit that the trial court's conclusion in this respect was fundamentally erroneous.

Granting that the Legislature of the State of New Jersey, as suggested by the trial court, knew what the religious Order of St. Benedict was; and with this knowledge the Legislature inserted in the Act incorporating complainant, the following proviso:

> "That such By-laws shall not be repugnant to nor inconsistent with the Constitution of the United States or of this State."

The insertion of this, it may be conceded, gave no new right nor prevented any, which would not have existed, or could not have been maintained without it. It operated, however, expressly to condition all membership obligations so that the parties must thereby know that the civil law, not the canon law, is the supreme law of the land.

True to American principles, and that law guaranteeing freedom of worship, the Legislature would grant the Order a legal existence to enable it best to fulfill its avowed purposes, and even thereby in its administration of its own affairs, to apply its own rules of the canon law. Within the administration of its own affairs, to which the jurisdiction of ecclesiastical Courts would be limited, the Legislature would not dispute with the Order, nor on the other hand concede, that the "vice of personal ownership" must be "cut off by the very root"; that such ownership is a "most baneful vice", and that he who may own even a "book", having been admonished once and again and doth not amend, must be subjected to punishment. (11) But when, as a wise legislative foresight perceived, it came to extending the application of those rules to the determination of rights determinable only by the civil courts, an inconsistency, and even an absolute repugnancy, would arise. Such an application by the Order would be contrary to the institution and form of our government, and against equity and good conscience, and in fact almost every maxim and principle of equity jurisprudence of America.

So the Legislature desired no misunderstanding as to the limitations of this administration of the rule of St. Benedict and of the principles of the canon law; no conflict of law or authority; and in fact no inconsistency even, with the fundamental civil law guarantee-

ing personal and property rights and to each individual the right to have those rights determined by the civil courts. In other words, the Rule of St. Benedict and the ecclesiastical law is not to supersede the civil law.

That this precaution was inspired by the earlier experiences of our civilization cannot be doubted, and it logically follows from the separation of the Church and State. And this expression of the legislative intent eliminates at the outset the possibility of the acceptance by civil courts of the doctrine of the canon law involved and stated in this testimony. It preserves to the Society the maximum of religious freedom, and yet preserves to the members their civil rights, and before the law the Society comes as any other corporate entity. As said in **Watson v. Jones,** 13 Wall. 679:

> "Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all its class, and that our duty is the simple one of applying those principles to the facts before us."

Following **Watson v. Jones,** the appellate court said: (329)

> "The only question involved is that of the le-

> gal ownership of the specific property described in the bill, as between the complainant and the defendant, and that question is not to be determined by the canon, or church law, but by the law of the land. The canon law, however, or the law of the church of Rome, as between Father Wirth and the Church or the Benedictine Order, may have required of him during his lifetime strict adherence to his vows and observance of the Rule; but it cannot be seriously contended that either the vows or the Rule or both together, can have any effect whatever upon the legal right of Wirth to acquire and hold property in his own right."

As being in the same class with **Goesele v. Bimeler,** (*ante* p. 21), a number of cases are cited in complainant's brief in support of the petition for writ of certiorari in this case, "community" cases, said by the complainant to be "exactly similar" and controlling in authority. The same cases were referred to by the trial court as "similar" to the case at bar, and in the opinion overruling the demurrer in **Benziger v. Steinhauser,** 154 Fed. 151, they were cited and referred to by Judge Ray as tending to support the validity of the membership contract sued on in this case. And it will no doubt be so urged upon the attention of this court in complainant's brief upon the submission of the case.

As has already been stated, under a former reference in this brief to **Goesele v. Bimeler,** (*ante* p. 21), these cases without exception present instances of *executed* contracts, such as the case of a withdrawing member suing to recover *from the community*, property he had himself actually transferred to the community; or as suing to recover *from the community* for services already rendered; and recovery was denied in all such cases because complete performance had already been

made of a contract not in itself vicious or immoral, so as to give a right of recovery as sought.

Goesele v. Bimeler, 14 How. 589, has already been noted; and the extended quotation (complainant's "Petition and Brief" pp. 25 to 27) from the opinion of this Court by Mr. Justice McLean in complainant's brief on petition for the writ must be read with the knowledge of the nature of the action then pending, its subject matter, and the status of the controversy then before the Court.

For it is no anomaly that a Court may refuse to lend its aid in undoing performance already completed, and on the other hand, in respect to a contract of the same nature, decline to *require performance* in accordance with its terms.

Schriber v. Rapp, 6 Watts 300, 30 Am. Dec. 327 was an action for the accounting brought against the "Harmony Society", by the heirs of one of the members of the Society. **The action relates only to property conveyed by the member at the time he joined the community.** The articles of the Society provided that a member should give to the Society all his property, but he had the privilege of withdrawing at any time, taking with him his property, and receiving compensation for services rendered the Society. And it was held that the heirs of members could not exercise the right of withdrawal after the death of the ancestor.

Burt v. Oneida Community, 137 N. Y. 346, is found upon examination to be in no wise similar to the present case. The only similarity is in respect to the conditions and terms upon which the respective communities,—The Order of St. Benedict in this case and the Oneida Community in the case cited,—were held together and the purposes sought by them.

In the Oneida Community case, articles of association had been signed, each subscriber surrendering his individual property, and it thereby became an inseparable part of the Community property. Each member was at liberty to withdraw at any time, but on withdrawal he was not entitled, as a matter of right, to demand any share of the joint property. There was also a stipulation that no member should ever bring an action or prosecute any suit to recover wages or compensation, or to recover any property contributed. The plaintiff contributed nothing to the capital, but for some time acted as salesman. Dissensions having arisen, he attempted to take employment elsewhere and at the same time hold his membership. The members of the Community in council solemnly decided that by his conduct he had ceased to be a member. **Plaintiff then brought action against the Community, asking for an accounting and a division of the Community property among the members.** On this state of facts it was held:

> "That viewing the community simply as a business undertaking, it was not unlawful; that plaintiff's acceptance of employment by another company, and retention of his earnings, was a breach and a renouncement of his obligations as a member of the community, and terminated his right to share in the enjoyment of the use and possession of its property; that the action of the community was not an expulsion of plaintiff, but simply a declaration as to the effect of his action, and a refusal to acquiesce in his reservation of a right to retract his withdrawal; and, therefore, that the action was not maintainable."

In **Waite v. Merrill,** 4 Me. 102; 16 Am. Dec. 238, the action was against the Trustees of the Shaker Society to recover for services rendered by the plaintiff to the Society while a member thereof; and the decision of

the Court and the fact that because of its nature the case is no authority here is sufficiently indicated in the expression of the law in the syllabus as follows:

> "Implied Contracts,—When an express contract is in force the law does not recognize an implied one; and when services are performed under an express contract, the action to recover for such services must be under the express contract, and that only, unless in consequence of the fault or consent of the defendant.
>
> "A member of the Society of Shakers is bound by his covenant with the society whereby on becoming a member he stipulates never to make any claim for his services.
>
> "The covenant exacted by the Society of Shakers of its members is not void, and is not in violation of any constitutional right.
> "Money paid on an illegal contract, voluntarily and knowingly cannot be recovered back."

In **Schwartz v. Duss,** 93 Fed. 529, it is said:

> "It is clear that the above recited articles of agreement are valid contracts";

but to interpret this holding the nature of the action must be considered and it is found to be simply an action against the Harmony Society by the heirs of a deceased member, to recover the interest claimed to have been held by the ancestor in the Society property, the ancestor having fully vested title in the Society. And it was held that the agreement upon the part of the contributing member not to demand an accounting of moneys contributed was valid and binding.

This case was affirmed without comment in the Circuit Court of Appeals, 103 Fed. 567, the opinion of the lower court having been adopted and quoted in full.

Likewise, in the Supreme Court of the United States, 187 U. S. 8; 47 Ls. Ed. 53, the decision of the Circuit Court of Appeals was affirmed on the ground that the agreement not to demand an accounting for moneys contributed was valid and applied to the heirs of the members.

The case of **Gasely v. The Separatists' Society of Zoar,** 13 O. St. 144, is shown in the trial court's decision to have been an action by withdrawing member for a division of the community property. As to what the case involved, the Court's own language may be quoted:

> "The case here is not that of a futile effort to transfer property resulting in a reverter of the property to its former owner; but a claim for further compensation for services rendered under an agreement, where the pleadings admit that the compensation stipulated for has been fully paid and received. * * * * * *
> "Upon what principle then can she ask to disturb a possession and uproot a title which her own agreement contributed to create and establish and to which she had not any prior and paramount right?"

And in conclusion:

> "We regard it simply as a case in which the equity powers of the court are invoked to decree an account and partition in favor of those who do not show any present legal or equitable right to the property in which they claim to participate, and found their right principally, if not altogether, upon the legal incapacity of the present possessors to hold it."

It is of these cases that it was said in the opinion written by Judge Reed for the appellate court: (330)

> "These suits were brought by members of the Separatists and Harmony Societies established in Ohio and Pennsylvania early in the last century, and the Oneida Community in New York established in 1848, by members thereof respectively, after they had withdrawn from the Society, or by the heirs of a member after his death, for partition of the property of the Society, or to recover the value of property conveyed or services rendered to it before the withdrawal or death of the member; except that in the Oneida case the suit was by one who had withdrawn from the Society to be reinstated therein. The contracts there involved had been fully performed by each of the parties, and it was held in each case that there could be no recovery. The facts in each case are so materially different from those in this case that the decisions have little or no bearing upon the questions here involved. This suit involves only the property acquired by Father Wirth after he joined the Society, the legal title and possession of which he retained until his death."

This analysis but justifies respondent in again asserting that in the application of these cases lies the fundamental error in complainant's case and in the decision of the trial court, viz: in treating the contract sued on in this case as executed and not executory. As applicable in principle, attention is now directed to conclusions reached in cases, not involving membership conditions in any religious society, and yet not necessarily so, where the aid of equity was sought as herein, to enforce contracts as to the subject matter there, as here, executory.

As well stated in the opinion by Judge Reed: (331)

> "Complainant has cited to us no authority which sustains its contention, and upon a

somewhat diligent search we have not been able to find any that does. Authorities are not wanting, however, if the vow and Rule together are treated as a contract and to meet what is claimed for it by complainant, that it is not enforceable as against after acquired property, either at law or in equity."

Thereupon the writer directs attention to the cases cited following:

In **Hershy v. Clark,** 35 Ark, 17; 37 Am. Reps. 1,-4, there was involved the question of the validity of a contract between two brothers, neither of whom were married, who by their joint industry, had acquired a large property real and personal which they held in common. They entered into an agreement whereby it was agreed that upon the death of one the survivor should hold all the interest of both in the property to the exclusion of all other persons. Upon the death intestate of one of the brothers his heirs claimed his share of the property as against the heirs of the other, who died intestate sometime after the death of the first. Of the contract the court said:

"It professes to convey nothing *in presenti*, and cannot stand as a conveyance; nor can it be upheld as a mutual covenant. **It is unreasonable and against public policy, that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property, of every nature whatever, which he at the time possesses; but also of all he may afterward acquire. Such a contract would not be enforced either in law or equity. It is obvious, too, that the brothers did not intend their obligations to have that force during their lives. * * * It was revocable at pleasure by either.**"

Not different in principle was the question before the Ilinois appellate court for its consideration in **Bates Machine Co. v. Bates,** 87 Ill. App. 225. In that case there was a contract entered into between Albert J. Bates and another with the plaintiff's assignor which contemplated the extension in capital and volume of business of the Bates Brothers as theretofore conducted by them, the third party contracting to furnish the additional capital. Bates was possessed of great skill in designing machinery of the kind being manufactured; and as a part of the contract by which the new Company was formed, it was provided:

> "Said A. J. and W. O. Bates put in their entire business, book accounts, * * * * * etc., also all patents now in existence and all inventions hereafter made by either the said A. J. or W. O. Bates."

Subsequently A. J. Bates invented and patented a fence machine to be manufactured under contract with a third party. The company originally formed thereafter filed its Bill of Complaint against A. J. Bates and the parties with whom he had contracted, based upon the contract above-mentioned, and praying for specific performance against Bates—"That he be compelled to assign to complainant all patents which may be issued in the future." etc.

The trial court found in favor of the defendants and so decreed in their favor upon their cross-bill, and the Bates Machine Company appealed. The first question considered by the Court was this:

> "Whether the contract is such a contract as a Court of Equity would enforce in favor of the said Company against Albert J. Bates."

And it is said:

> "A court of equity will not lend its aid to give a party the benefit of an unreasonable or unjust contract, the enforcement of which would work a serious hardship. **Hetfield v. Willey,** 105 Ill. 286. 22 Am. Ency. of Law 910.
>
> "The contract provided that said A. J. and W. O. Bates should 'put in their entire business, book accounts, notes, machinery, patterns, stock, etc. manufactured and unmanufactured; also all patents now in existence and all inventions hereafter made by either the said A. J. or W. O. Bates'. It was further provided therein that A. J. and W. O. Bates should 'devote their energies and inventions to the business, same as they are now doing'. The contract constituted in effect an agreement on the part of A. J. and W. O. Bates to assign to the corporation proposed to be formed any inventions they might thereafter make. **It was without limit as to time and was an attempt to secure to the corporation the result of all the future labors and investigations of the parties named, so far as inventions were concerned. Such attempts to bind all future products of a man's brain are not regarded favorably by the courts.**"

A distinction was noted, broad and well understood, between an obligation to assign inventions or improvements upon an existing thing, which the assignor has already assigned, and a mere obligation to assign in gross, inventions of any kind and character whatsoever thereafter made. In the former case, the contract would as a rule be sustained.

The Court cites **Palace Stock Company v. Stable Car Line,** 142 Ill. 315, where the Supreme Court of that

State, in speaking of an agreement to assign future inventions said:

> "We but hold with other Courts when we say that an agreement to assign in gross, the results of an inventor's future labors and investigations, should not be liberally construed as against such inventor."

The same question was involved in the case of **McFarland v. Stanton Mfg. Co.**, 53 N. J. Eq. 649, where the contract in question provided for the assignment of "all Letters Patent of the United States now granted or applied for, or that may hereafter be applied for". And it was said by the Court:

> "The assignment of future improvements upon a machine in connection with the assignment of the patent for such machine is valid. A naked agreement to assign in gross a man's future labors as an inventor is not good. But where a man purchases a particular invention secured by patent, which is open to indefinite improvement, he may stipulate for the sale of future improvements he may make upon it. The subsequent patent, to be within the terms of the contract, must be an improvement upon the original invention."

As most appropriate here, as the statement of an established principle, we quote from Mr. Justice Bradley while Circuit Judge, in a case where a question arose concerning an agreement covering the assignment of future inventions, without limitations or qualifications:

> **"A naked assignment or agreement to assign in gross a man's future labors as an author or inventor, in other words a mortgage on a man's brain, to bind all his future products, does not address itself favorably to our consideration."**

The principle applied in each of the foregoing cases is identical with that which should be applied here. It of course matters not that the question of the validity of the obligation arises in what is considered the membership contract or obligation of a religious order. As already seen, and as cannot be contradicted, when the property and contract rights as between members of religious orders or between a member and the order itself, arise, general principles and rules of law govern. So that whether the obligation "to assign in gross" all after acquired property is made to the vendee of property, a secular body, or to a religious order, in principle it is the same. And it was in line with the principles stated in the foregoing cases, although without a precedent as to facts either identical or similar, that the Maryland Supreme Court reached the same conclusion in a case strikingly similar to the case now before the Court.

Bearing in mind again that no property is involved in this action except property acquired after the membership obligation claimed was entered into by the respondent's intestate, and that no specific or particular obligation in reference to any particular or specific property is either shown or claimed; and that all of the property involved in this action is the result, direct or indirect, of Wirth's literary works, accumulated by him with the admitted permission to so accumulate, the principle to be applied and controlling the decisions in the foregoing cases is fully and completely sustained in the case from which we now quote more extensively, viz: **Baltimore Humane Society v. Pierce,** 100 Md. 540, 70 L. R. A. 485.

For a complete understanding of the facts shown and of the questions involved, reference must be had

also to the first opinion in the case reported in 99 Md. 352; 58 At. 26.

It appears that in 1893 Elisha Pierce, then seventy years of age, was admitted as an inmate to the plaintiff's Society under a contract stating the conditions of his admission into the Aged Men's Home maintained by the Society, and stating also certain conditions under which in the supervision of that Home his removal would be effected. The rules of the Society also required an obligation to be given it at the time of the admission to membership by responsible sureties covenanting,—

> "That should he (the member) by any device legacy or otherwise, become the owner of any property whatever, he will have the same. with any now owned, conveyed and transferred to the said corporation in obedience to this covenant, and by this instrument he grants to the corporation above named, all his right and title to any and all property of which he is now seized and possessed. This done in consideration of such admission and the applicant thereby constitutes the Treasurer thereof, for the time being, at his death, executor of this instrument, which is to operate as a last will and devises to said Institution his entire estate, real and personal. * * * * * "

It further appears from the form of the contract that the rules of the Institution required the execution of this covenant by the member himself although in this case it was executed only by the sureties. He was admitted to membership, however, and remained there for ten years; and at that time, in 1903, his son, George W. Pierce, one of the sureties on the contract, died intestate, and Elisha Pierce, as his only heir at law, became entitled to his estate, amounting to $4,000.00.

The Society then filed a bill in equity, the prayer of which was that "a decree be passed declaring that all property which under the laws of Maryland would be payable by the administrator to George W. Pierce to Elisha Pierce, is the property of appellant, as assignee of Elisha Pierce and as creditor of George W. Pierce, and that the administrator be restrained from handing over the estate or any part thereof to Elisha Pierce and that Brewer, the surety, be decreed to carry out the terms of his contract of suretyship". In the first case on demurrer for want of equity, the decree was for the defendants; and the order sustaining the demurrer was on the Society's appeal affirmed in the first opinion.

Baltimore Humane Society v. Pierce, 99 Md. 352; 58 Atl. 26.

In this opinion, the court's decision is reached principally because of a want of mutuality in the contract, in that it was not signed by the appellant, nor did it impose any obligation upon the appellant society. The Court also observes:

> "It is only an agreement to sign a contract and this agreement is alleged to have been made more than eleven years ago."

It appears that the same matter was involved in the case under the same title reported 100 Md. 820; 70 L. R. A. 485, that appeal being also from the trial court's order sustaining demurrers to the Bill. On behalf of the Society it was urged:

(1). That the consideration given by the appellant to the member was greater in value than the amount now in controversy.

(2). That a contract as to after acquired property is binding; and

(3). That the circumstances of the case showed it to be in no respect against public policy.

After expressing its doubt as to the sufficiency of the contract itself as an expression of the intents and obligations of the parties, the Court in this opinion determines the case upon the appellant Society's own theory. And from the opinion we take the liberty of quoting at length:

> "But without further consideration of those and other minor matters, we are of the opinion that it would be contrary to public good to lend the aid of the courts to enforce such a contract as this, if it must be construed according to the appellant's contention. We are not unmindful of the fact that a court should not lightly strike down a contract on the ground that it is contrary to what is called 'public policy'. That is an uncertain, indefinite term, and, when judges come to apply the doctrine, they must take care that they do not trespass upon the right to make contracts as parties see proper, so long as they do not violate some principle or policy of law. The learned chief judge of this court said in the American Casualty Ins. Co's. Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.) 82 Md. on page 574, 38 L. R. A. on page 116, and 34 Atl., on page 785. 'No exact definition of public policy has ever been given or can be found. Speaking generally, the principle which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good may be termed the policy of the law, or public policy, in relation to the administration of the law'. And we would add that we do not now pro-

> pose to attempt to define the subject more accurately. **But when dealing with a delicate subject of this character, it gives us confidence in our conclusion when eight judges, after due deliberation, conclude, as we do, that the public good forbids the use of the process of the courts of this state to enforce a contract such as this is claimed to be.** It is proper that we should say at this point that we have no doubt that the appellant is a most useful institution, and is managed by those who would not intentionally wrong anyone, and there are other equally deserving institutions in the state **but to give the latitude to this contract that is contended for it might not only result in great wrong to unfortunate people, but establish a precedent that might lead to dangerous consequences.**

And noting a distinction that must be observed in the application of any such contract to property then owned and in existence, and to be affected by the contract, and after acquired property, the Court's opinion continues:

> "If an applicant had surrendered all he had when he entered, it would be bad enough to hold by such an uncertain tenure, but when he does that he knows what he is doing. He knows what he had, what he is giving up, and for what. That was sustained in **General German Aged People's Home v. Hammerbacker**, 64 Md. 595, 54 Am. Rep. 782, 3 Atl. 678; and, although we took occasion to speak of such institutions with the praise that they deserve, we said on the question now under consideration: 'As to its power, by bond or otherwise, to enforce the conveyance to it of any future acquisition of property, it is not necessary for us to express any opinion, as that question does not arise in this case; the whole property now in dispute being owned by Zolles at the

time of his application for admission. **We may say that some different principles might govern the case of future acquisitions'.** Although this question was not then decided, the expression which we have italicized indicated very strongly how the court then felt about it. * * * * * No human being can know or remotely conjecture how much, if anything, any of them may inherit or in some unexpected way receive. It was doubtless far from the thoughts of this old father, the son, and everyone else acquainted with them, that this old man would survive his son, and take his entire personal estate. If it had been $35,000 instead of $3,500 it would have been the same thing,—without any limitation. Every dollar of it would be diverted from the channels in which it would naturally go, to an institution that had undertaken to keep the father for an agreed price,—small, it is true, but agreed upon. If he had died the day after he entered, it would have had that compensation, and took those chances. * * * *

Assignments have been sustained in some cases which were made by heirs of their interests in an ancestor's estate, but it was the interest in a definite fixed estate; and similar agreements have been upheld,—the court, of course, being satisfied there was no fraud and no overreaching. But we have not been referred to a case which goes to the extent we are asked to go in this. The old common law barriers supposed to have been erected for the good of the public have, in the march of progress, been completely removed, or greatly reduced, in suits involving assignments of choses in action, dealings with after-acquired property, and similar matters. **Equity has lent her hand to help litigants over some of the places too well fixed at common law to overcome without such aid, but thus far we have not departed from the common law**

> **far enough to sustain a suit for an alleged breach of such a contract as this."**

The law is stated in the syllabus to be:

> **"An agreement by an applicant for admission to an old folk's home to deliver to it any and all property which he may, by any devise, legacy, or otherwise, become the owner of, in consideration of maintenance during life, is void as against public policy."**

It is of this case that the trial court "without passing upon the soundness of this decision" considers that it furnishes no support for the proposition that **after Pierce's death his executor could have recovered from the home the value of the services which Pierce might have rendered to it in consideration for his support during his life.**

We submit, however, that in this respect the two cases are parallel. Pierce continued a member of the Society for ten years and was a member at the time he became entitled to the property which was claimed by the Society. Although he himself did not execute the obligation to transfer to the Society his after acquired property, yet this was a condition of membership, one of the Society's rules, and he received the benefit of the membership contract. *While still a member of the Society* he became vested, if not directly with the legal title, yet of a right to receive the same upon distribution; and as urged in the Society's behalf, the membership contract obligated him to complete the transfer.

Complainant's claim in this case is based upon an agreement to assign and transfer after acquired property **in no place subscribed by the member.** On com-

plainant's theory, Wirth for fourteen years received the benefits of his membership; and it is urged here, as in the Maryland case, that "the consideration already given * * * * is greater in value than the amount now in controversy".

Here as in the Maryland case, the property claimed under the membership contract became vested in the member (according to complainant's theory) while membership still continued and while the member still recognized the obligation. In what way the trial court's conclusion was reached, that this case is to be determined by the same rule as if it were an action by the administrator to recover from complainant for services rendered by the deceased in his lifetime, we have not been able to comprehend; and we submit that the parallel between the two cases is so striking, as, if the correctness of the Maryland Court's decision is conceded, the same principle must control in this case.

In announcing its conclusion as to the *moral aspects* of the obligation sought to be enforced in this action, and that the enforcement of such an obligation is inconsistent with the maxims of equity, Judge Reed, speaking for the Circuit Court of Appeals, said: (331)

> "The vow in connection with this Rule not only binds the member in physical and mental servitude to the Order for Life, or until the Head of the Church shall see fit to absolve him from his obligations, but he also surrenders all control of his will to the Order. Such an agreement is no more enforceable, in the civil courts at least, than would be an agreement by one to surrender or forfeit to another his life. (See **Clark's Case**, 1 Blackford, 122 (Ind.), 12 Am. Dec. 213 and note) In this country it is the inherent and natural right of every person to

> acquire and hold property in his own right; and the state is interested in preserving the liberties as well as the lives of its members, and they are guaranteed against the deprivation thereof, either by the state or by any person, individual or corporate, without due process of law. If the agreement to perform the services is not enforceable, then upon what principle can it be enforced as an equitable title or right to the fruits of such services? We are of the opinion that there is none. Complainant has cited to us no authority which sustains its contention, and upon a somewhat diligent search we have not been able to find any that does."

After again reviewing the entire record, we are none the less impressed than upon the trial with a sense of impatience at the absurdity of some of the claims made in complainant's behalf; and particularly the claim of material consideration moving from the Order to Wirth, and that it exceeded the value of the property involved. The thought is suggested, that the half century of faithful service given by this remarkable man, who, possessing qualities of industry, character and ability that would have ranked him high in other ways, gave up worldly ambitions and pursuits and became a pioneer for the Order, adding to its influence, worth and power, should in itself raise some co-ordinate obligation upon the part of complainant; and that it is in better accord with the maxims of equity to say that such eminent service independent of any material considerations moving to the Order must in itself raise a corresponding obligation on its part to minister to the small extent here shown to his comforts when in need thereof. And if it be so considered, then the only consideration that can in any view of the case be relied upon, that of "decent support," is exhausted, and no consideration

remains for the additional obligation asserted, viz: To make the Order the beneficiary of all his worldly goods.

In conclusion it is respectfully submitted that in no respect does error appear in the decision of this case by the Circuit Court of Appeals; that the contract, if the membership obligation must be accorded that dignity, remained, and is now, as to the subject matter of this suit, executory only; that by the very conditions attaching to Wirth's membership, the obligation sought to be enforced was by express exception not to be applied to the property which forms the subject matter of this suit from which fact no equitable right could accrue to complainant; that the contract itself, conceding everything that is claimed for it, and stripped of all ecclesiastical construction and of the conclusions of the pleader and the witnesses, stands merely as a naked promise at some time in the future to make a gift or transfer in gross of all after acquired property, and is incomplete and unenforceable for want of execution; and that on the whole, and as considered even as upon demurrer to the Bill, the obligation upon which complainant's case depends, is contrary to public policy and void. And that the trial court's conclusions sustaining the principles claimed in behalf of complainant were fully answered and shown to be erroneous by the decision of the Circuit Court of Appeals; and that that decision is correct and should stand as the final judgment in this case. And because of the foregoing, the writ of certiorari should be dismissed.

WILLIAM H. PITZER and
WILLIAM HAYWARD,
Solicitors for Respondent.